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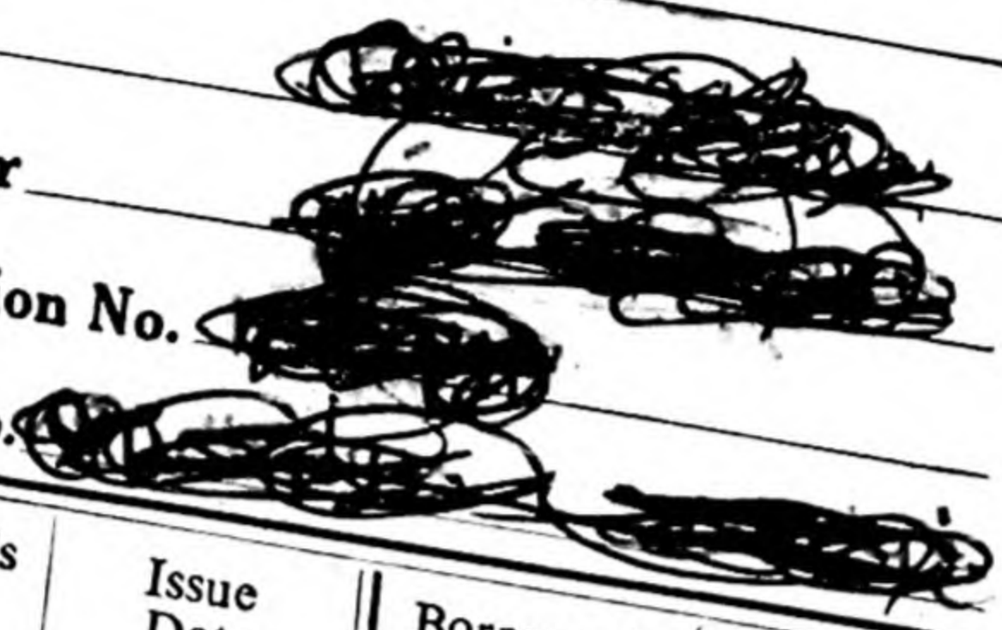

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G. N. DAR, B. A. LL. B.
Vakil High Court.
SRINAGAR (Kashmir

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Borrower's No.	Issue Date	Borrower's No.	Issue Date

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Borrower's No.	Issue Date	Borrower's No.	Issue Date

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Where a debtor has failed to exercise his right of appropriating a payment himself it is open to a creditor to do so up to the very last date, and even in the course of the trial, unless something has happened which renders it inequitable to allow him to do so and it is always a question of the intention of the creditor to be gathered from the circumstance of the case.

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Held, that the uncle should be recorded as an occupancy tenant.

Per *Campbell, J. M.*—An uncle is no heir to his nephew under section 22 of Act II of 1901. **U. P. B. R.** MOHAMMAD YUSUF KHAN *v.* NANHI **409**

——— **S. 22**—*Succession*—*Uncle, whether can succeed to nephew's holding*—*Cultivation, sharing in.*

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Obiter dicta.—A *zemindar* has a right to create subordinate rights of any character he chooses, *e. g.*, to fix a rent in perpetuity or to allow succession according to Hindu Law. **U. P. B. R.** JANG BAHADUR SINGH *v.* M. MUHAMMAD YAHIA **649**

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A perpetual lease granted by a widow who has only a life-interest in the occupancy tenancy is not after her death binding upon the land-holder under section 28 of the Tenancy Act.

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Held, that, under the present law as under the old law, the former proceedings were no bar to a proceeding for resumption. **U. P. B. R.** RAM CHARAN *v.* BISMILLAH BEGAM **5**

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A co-sharer who is not a recorded co-sharer need not join as a plaintiff in a suit for ejectment.

A landlord obtained a decree for arrears of rent against an occupancy tenant and then brought a suit for his ejectment under section 52, Agra Tenancy Act, on the ground of non-satisfaction of the decree for arrears of rent for more than fifteen days. Before the decree for ejectment was passed and while the ejectment suit was still pending, the judgment-debtor offered the decretal amount to the decree-holder, who refused to take it on the ground that it was not offered to him within fifteen days of the decree:

Held, that if the decree-holder had accepted the money when tendered, no decree for ejectment could have been passed, as at the date of the decree for ejectment there would have been no unsatisfied decree for arrears of rent, that, the landlord had no right to complain of non-satisfaction of the decree owing to his own refusal to accept the tendered money and that, therefore, the decree for ejectment could not be made.

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If, therefore, the ex-grove-holder is dispossessed by the land-holder, he cannot maintain a suit under section 79 of the Agra Tenancy Act, as he is not a tenant. **U. P. B. R.** SHEONANDAN SINGH *v.* LACHMAN RAI **447**

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Held, that the plaint and the notice were both defective and the suit was not maintainable on these grounds. **U. P. B. R.** MURLI *v.* RAJA RAM **554**

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Held, that under section 177 (*c*) of the Tenancy Act an appeal lay to the District Judge from the decision of the Assistant Collector.

Where the District Judge misapprehended a certain entry in the *Wajib-ul-arz* and, while recording a finding did not in express terms discuss the evidence upon which the finding was based, the High Court, in the absence of a certificate that the finding rested upon no evidence, treated the decision of the lower Appellate Court on this point as a finding of fact with which it could not interfere. **A.** SUNDAR LAL *v.* MALTHU **710**

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The Board can interfere in revision only when there is a *very grave* error of law and as a matter of policy will not interfere unless there has also been a *miscarriage of justice.*

A *Kayastha* got entered in the *patwari's* papers the names of his natural (*kahar*) sons in place of his name in respect of his holding but himself remained in possession with his sons. The *zemindar* was no party to this application for entry of names:

Held, that as the entry of the sons' names had no legal force and the father remained in possession with his sons, his rights as an occupancy tenant did not come to an end. **U. P. B. R.** KALKA PRASAD *v.* BAIJ NATH PRASAD **676**

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In a suit instituted in a Revenue Court for ejectment on the ground that the defendant was in possession without the plaintiff's consent and without the payment of any rent, the defendant pleaded that he was in proprietary and adverse possession of the land but this issue was not tried:

Held, that the District Judge on appeal ought to have acted under the provisions of section 197 of the Agra Tenancy Act and disposed of the plea of jurisdiction. **A.** MANOHRI *v.* BHURA **565**

——— ——— ——— **s. 197**—*Suit triable by Revenue Court—Appeal—Transfer of appeal by District Judge to Subordinate Judge—Subordinate Judge, whether can pass order of remand.*

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Waste water may be used for the purposes of a garden as it cannot be used for a second time for domestic purposes.

In cold weather the garden of the applicant was found well watered but the *pacca* reservoir and channel connected with a well in the garden were dry and full of leaves:

Held, that this circumstance was not sufficient for conviction of the applicant for having used for gardening the water supplied for domestic purposes. **A.** SITAL PRASAD GHOSH *v.* EMPEROR, 13 A. L. J. 546 **830**

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Under *Alayasanthana* Law as in *Marumakatayam* Law no partition of *tarwad* property should be permitted during the minority of some members of the *tarwad*, unless such partition is shown to be beneficial to such minors. **M.** SARVESHRI SHETTATHI *v.* PUTTAMMA SHETTATHI **474**

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The validity of a mortgage screened by time from attack cannot be questioned by a reversioner on the ground that it has been merged into a subsequent mortgage or sale to challenge which the suit is within limitation.

When time once begins to run against a reversioner for contesting the validity of an alienation of ancestral property no subsequent disability to sue on the ground of minority of another reversioner can bar its flow.

In the absence of any clear proof of reckless extravagance or immoral waste on the part of the alienor of ancestral property, strict proof of necessity for ordinary debts is not required, particularly where the income of the estate does not appear to be quite sufficient to meet the family expenses and the alienor has sons or does not expect to be sonless.

Alienation—concld.

Interest on a just debt is also a necessity. So is the money due on account of produce where the mortgagor holds the land as a tenant of the mortgagee and enjoys the whole produce himself and allows the rent to mount up against him provided the validity of the mortgage cannot be questioned.

Payment of revenue is also an act of necessity.

Money spent on defending a criminal case can be validly charged on ancestral property.

A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. **P.** CHANDA SINGH *v.* MUKAND SINGH, 61 P. W. R. 1915; 144 P. L. R. 1915 **761**

———*Necessity—Sale of ancestral property—Objection on ground of immorality of purpose*—Onus—*Obligation of vendee.*

Where a Hindu father sold his ancestral house to a third person and after his death his son sued for recovery of possession, alleging that the sale consideration money was taken for an immoral purpose:

Held, (1) that it lay on the plaintiff to prove the immorality of the transaction if he wanted to free himself from his liability to pay his father's debt;

(2) that the sale could not be maintained as a sale unless the vendee proved necessity;

(3) that as the sale had taken place some 20 years before suit, circumstantial evidence should be considered sufficient to establish necessity. **P.** RAM LABHAYA *v.* GOPAL DAS, 78 P. W. R. 1915; 151 P. L. R. 1915 **891**

Alluvial accretion—*Non-occupancy holding, accretion to—Occupancy rights in accretion, acquisition of—Limitation.*

Occupancy rights in an alluvial accretion to a non-occupancy holding arise only by twelve years' continuous cultivation of that accretion. **U. P. B. R.** GANESH *v.* SAHIB-UN-NISSA BIBI **37**

Amendment. *See* CIVIL PROCEDURE CODE, 1908, O. VI, R. 17.

——— ——— Original defect in plaint, if cured by amendment **249**

——— ——— Plaint, amendment of—Discretion exercised by lower Appellate Court—High Court, power of, to interfere **355**

——— ——— **of decree.** *See* APPEAL.

——— ——— **of plaint.** *See* CIVIL PROCEDURE CODE, O. VI, R. 17.

Anubhavam tenure—*Denial of landlord's title, whether works forfeiture of tenancy.*

Where land is held on *anubhavam* tenure, the denial of the landlord's title not directly addressed to the landlord does not work a forfeiture of the tenancy. **M.** SANKARAN NAIR *v.* KOCHAPPU MENON **427**

Animal—*Injury caused by vicious horse—Defendant knowingly keeping vicious horse, liability of—Negligence, if necessary to support action—Damages, suit for.*

The defendant knowingly kept a horse which was a vicious animal. The horse injured the plaintiff and he sued for damages:

Held, that the defendant must be held liable notwithstanding that he was not guilty of negligence, as negligence was not necessary to support a suit of this nature. **C.** GANDA SINGH *v.* CHUNI LAL SHAHA, 19 C. W. N. 916 **862**

Appeal (Civil)—*Amendment of decree—Material alteration—Civil Procedure Code (Act V of 1908), s. 152.*

An appeal lies from an amended decree where the amendment has the effect of appreciably adding to the right of the decree-holder. **N.** DINAJI *v.* LAXMAN, 11 N. L. R. 92 **589**

——— Appellate Court's power to cancel order of costs passed by first Court **137**

——— "Appellate jurisdiction"—Judgment—Appeal against such order, if maintainable—Discretionary power given to Subordinate Courts—Appellate Court, power of, to interfere **846**

——— Award—Application to set aside award dismissed—Decree—Appeal, maintainability of **512**

———, Court of, duty of—Weight to be given to opinion of trial Judge **229**

——— Court fees, deficiency of, made up after several orders, effect of **571**

——— Decree passed against several persons—Whether one of them can appeal without others joining him **568**

——— Exclusion of time requisite for obtaining copies **833**

——— Objection under section 92, Evidence Act, taken for first time in Court of Appeal **223**

——— Order providing for appointment of Receiver **504**

———*Order of Record Officer, appeal from—Jurisdiction.*

No appeal lies to the District Judge from an order of the Record Officer. **A.** BHARAT DAUJ DAMODAR DAS *v.* MAHABBAT **421**

——— Pre-emption decree—Vendee applying to withdraw money, whether estopped from appealing **452**

———Proprietary title, question of—Issue not decided—Appeal, whether lies to District Judge—Onus on wrong party—Finding based on no evidence—Revision, grounds for **61**

——— Reasonable opportunity to appellant to be heard in support of appeal—Advocate filing appeal not Advocate for appellant called upon to support appeal—Reasonable opportunity, if given **666**

———Receiver, appointment of—Discretion of lower Court—Appellate Court, power of, to interfere **485**

———Redemption, suit for—*Muafidar* pleading proprietary title—Decision—Jurisdiction **484**

———, security for—Notice to show cause—Sufficient cause not shown—Dismissal of appeal on that day—Material irregularity **59**

———Suit triable by Revenue Court—Transfer of appeal by District Judge to Subordinate Judge—Subordinate Judge, whether can pass order of remand **633**

——— **Criminal**—Acquittal—High Court, power of, to interfere—Grounds of interference **657**

——— ——— Letters Patent (Mad.), cl. 15—Criminal trial—Revision **96**

Appeal (Criminal)—concld.

———Power of Sessions Judge in appeal—Acquittal—Procedure—Enhancement of sentence, whether a fit ground for ordering re-trial **65**

——— Several accused — Judgment — Appellate Court, duty of **336**

———, **second**—Common carrier, negligence of—Question of law or fact **260**

———Commutation—Occupancy *raiyat*, advantage of—Revenue Court, decision of, how far affects Civil Court **896**

———Finding of fact—Substantial error in procedure—Court overlooking material evidence—Consideration—Legal necessity **785**

———, ground for interference in **801**

———, maintainability of—Orders passed in execution of decree—Revision, erroneous view of law, if ground for **740**

——— Misreading of record **167**

———New defence if can be set up **811**

——— *Omission to consider oral evidence — Material irregularity in procedure—Punjab Courts Act (III of 1914), s. 41 (1) (c).*

An omission by a lower Appellate Court to consider the oral evidence and record a finding thereon, is a material irregularity in procedure, and is a good ground for second appeal. **P.** KALU *v.* BIR SINGH, 73 P. W. R. 1915; 149 P. L. R. 1915 **901**

——— *Oral evidence discredited on general reasons—Particular deponent not discredited—Error in law—Appeal.*

To discredit oral evidence on merely general reasons not affecting the credit of any particular deponent, is an error in law and justifies interference in second appeal.

Selected Decision No. 9 of 1914, relied upon. **U. P. B. R.** RAM SUBHAG CHAUBE *v.* KESHO PRASAD SINGH **673**

——— Plea of want of registration of security, if allowed **271**

——— *Point not taken in lower Courts cannot be raised—Parties bound by case arising on pleadings.*

A point not taken in the lower Courts cannot be raised for the first time in second appeal.

The parties are bound by the case which arises on their pleadings and which has been enquired into by the Court of first instance, and they cannot rely upon a point which has not been raised in that Court and which depends upon facts for its determination. **P.** DYAL *v.* HIRDE RAM, 80 P. W. R. 1915; 153 P. L. R. 1915 **895**

——— *Question of fact decided without there being evidence to support finding—Question of law.*

Where a Court decides a question of fact without there being any evidence whatever to support its finding, there is a question of law and the Board will interfere in second appeal. **U. P. B. R.** KESHO PRASAD SINGH *v.* SUBA KHAN **563**

Appeal to Privy Council—Appeal dismissed for default by High Court—Decree affirming decree of Court below **469**

——— *Execution of decree in suit of value of Rs.* 10 lakhs—*Subject-matter of dispute —Civil Procedure Code (Act V of* 1908*), s.* 110.

Where in execution of a decree in a partition suit involving property of the value of rupees ten *lakhs*, the applicants disputed their liability to 4/6ths of an item of Rs. 11,709:

Held, that such a case did neither satisfy both the conditions set forth in the 1st clause of section 110 of Act V of 1908, nor did it fulfil the conditions mentioned in the second clause of that section, and that consequently permission to appeal therefrom to their Lordships of the Privy Council could not be granted. **P.** DEVI DASS *v.* NARPAT RAI, 60 P. W. R. 1915; 140 P. L. R. 1915 **759**

Appellate Court, jurisdiction of, to determine proof whether according to law or not—Sufficiency of evidence, determination of, power of **282**

——— Mortgage—Redemption—Time fixed for payment of money—Appellate Court extending time and fixing another date, effect of **289**

Approver—Pardon forfeited—Power of Sessions Judge to direct prosecution—Plea not taken before Committing Magistrate taken before Sessions Judge, legality of **323**

Arbitration—Award—Application to set aside award dismissed—Decree—Appeal, maintainability of **512**

——— Award—Decree in terms of award—Both parties consenting to appeal being heard against such decree, effect of **408**

———Award, setting aside of—Appeal, maintainability of **411**

——— *Award, suit on—Failure to file award in Court within* 6 *months, whether bars suit —Award, whether in nature of foreign judgment* —Punchayatdars, *if entitled to administer to witness any reasonable form of oath agreed upon by parties —Civil Procedure Code (Act V of* 1908), *Sch. II, para.* 20—*Limitation Act (IX of* 1908), *Sch. I, Art.* 178.

A suit lies on an award, even though the same has not been filed in Court under paragraph 20, Schedule II, Civil Procedure Code, 1908, within six months, as required by Article 178, Schedule I, Limitation Act, 1908.

An award is not in the nature of a foreign judgment and a Court is, therefore, entitled to go into the merits of the same.

There is nothing illegal in the parties to an arbitration agreeing before *punchayatdars* to have evidence taken after the administration of any reasonable form of oath to the witnesses. **M.** MUTHUKARUPPA KONE *v.* VEERABHADRA KONE, 2 L. W. 320; 17 M. L. T. 241 **49**

——— *Reference by natural guardian of minors—Mutual agreement—Repudiation by other party, power of.*

A natural guardian can refer a question that concerns the wards to arbitration and when the question does not concern the minors solely but also the guardian, there is consideration and mutuality sufficient to preclude the other party to the reference from repudiating it. **L. B.** MG. PO MYA *v.* MA DOUNG, 8 BUR. L. T. 122 **800**

Arbitration Act (IX of 1899), s. 11—*Appointment of arbitrators, when complete—Reference to sole arbitrator—Subsequent insertion of additional arbitrator's name, effect of—Stamp Act (II of 1899), s. 14—Application to file award by one arbitrator only, validity of.*

The appointment of a certain person as arbitrator is not complete until such person has accepted the reference and consented to act.

Where a dispute between the parties was referred to a sole arbitrator, but before he had accepted the reference the name of a co-arbitrator was added:

Held, that the addition, having been made before the reference was accepted by the first arbitrator, did not convert it into a second instrument within the meaning of section 14 of the Stamp Act and the two arbitrators were competent to make an award.

The filing of an award is a purely ministerial act and can be legally performed by any one of the arbitrators appointed. **S.** SHAMDAS TEUMAL *v.* KHIMANMAL, 8 S. L. R. 302 **602**

Arms Act (XI of 1878), s. 14—*Spear, deposit of—Failure to deposit—Conviction, if legal.*

Section 14 of the Indian Arms Act does not require "a spear" to be deposited with a Magistrate and a conviction for omission to do so is illegal. **M.** CHAGANTIPATI CHINA BASAVAPP, *In re*, 2 L. W. 532 **544**

Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent—Enhanced Government revenue, whether payable by mortgagor or mortgagee **386**

Assam Land and Revenue Regulation (I of 1886), ss. 6, 71, scope of—*Ejectment—User for agricultural purpose—True test—Occupancy right, acquisition of, by 12 years' possession, effect of.*

Section 71 of the Assam Land and Revenue Regulation does not entitle a purchaser to eject any tenant having a right of occupancy under the rent law for the time being in force, or to enhance the rent of any such tenant, otherwise than in the manner prescribed by that law.

Where the defendants are found to be cultivators holding the entire tract for a period of more than twelve years, and a portion has been used for grazing purposes while the remainder is still covered by jungle:

Held, that the defendants are *raiyats* within the meaning of section 6 of the Assam Land and Revenue Regulation and that the use of the land for grazing purposes entitles them to claim a right of occupancy;

that the true test is to determine whether the user of the land has been for an agricultural purpose;

that the mere fact that a part of the land is still covered by jungle and has not been actually brought under tillage does not take the case out of the operation of section 6, which applies to land "cultivated or held."

A *raiyat* who has occupied and cultivated land for more than 12 years under a landlord who had no title to the land, nevertheless acquires a right of occupancy under section 6 of Act X of 1859 or Act VIII of 1869, B. C. **C.** BROJABASI KOER *v.* RAM SANKAR DAS **834**

——— **s. 71** **834**

Assignments in fraud of creditors—Part payment of consideration for a previous mortgage—Right of subrogation, whether exists **583**

Attachment. *See* EXECUTION.

——— Claim to attached property—Question of possession not decided—Power of High Court to interfere—Possession in one's own right—Release from attachment **228**

——— effect of, on property attached **572**

——— Mortgage of right to receive certain dues—Decree for sale—Order of attachment and injunction, whether competent **601**

——— before judgment. *See* CIVIL PROCEDURE CODE, 1908, O. 38 **271**

Award. *See* ARBITRATION.

——— , suit to set aside—Application for copy—Time requisite for obtaining it, whether deducted **860**

Balance sheet, falsification of, if offence under s. 477A., I. P. C. **105**

Benami mortgage—*Benamidar* mortgagee, right of, to sue—Mortgagor, whether can object to mortgagee's right **892**

——— purchase. *See* CIVIL PROCEDURE CODE, 1908, s. 66.

——— purchase—*Benamidar's* position and title—Real owner's powers **787**

——— Sale—Consideration—*Kobala* containing recital of payment of consideration—*Benami*, onus of proving—Defendant in possession—Presumption, whether arises—Admission of first evidence **696**

——— *transaction—Ostensible vendee paying off debts and making ready cash payment—Burden of proof.*

Where an ostensible vendee pays off the debts due by the transferor and makes an advance of ready cash on the date of sale, there is a strong presumption that the transaction is not *benami* and the burden lies heavily on the party who alleges that the transaction is *benami*. **M.** VAITHINATHA AIYAR *v.* VAITHINATHASAWMY AIYAR **970**

Benamidar, right of—Suit for specific performance **12**

———*Right to execute decree.*

A *benamidar* transferee of a decree is entitled to execute it **A.** KAMTA PRASAD *v.* INDOMATI, 13 A. L. J. 557; 37 A. 414 **593**

Benefit of doubt. *See* PENAL CODE, s. 307.

Bengal Drainage Act (VI of 1880), ss. 26 (1), 42, 44—*Drainage charge—Instalments, recovery of—Mistake—Limitation.*

Section 44 of the Bengal Drainage Act is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalments under the two sections 42 and 44.

A mistake about the year of the instalment cannot save limitation. **C.** MOHENDRA NATH *v.* NARENDRA KRISHNA **399**

——— **ss. 42, 44** **399**

Bengal Land Revenue Sales Act (XI of 1859), ss. 5, 6, 33—*Embankment charges, sale for, whether sale for land revenue—Collector, jurisdiction of.*

A sale of an estate for arrears of embankment charges (*pulbandi*) is not a sale for arrears of land revenue, and it is not competent to a Collector to hold such a sale under Act XI of 1859. **P. C.** DHIRAJ CHANDRA BOSE *v.* HARI DASI DEBI, 19 C. W. N. 507; 28 M. L. J. 480; 2 L. W. 422 **290**

——— **ss. 6, 33** **290**

Bengal Land Revenue Sales Act—concld.

——————— **ss. 13, 54,** *scope of—Sale, what passes by—Purchaser, rights of—Adverse possession—Incumbrance, acquisition of rights in respect of.*

At a sale under section 13, Bengal Land Revenue Sales, Act XI of 1859, it is not the rights of the recorded proprietor that pass, but the share itself.

Obiter.—A Hindu widow in possession of a share of an estate as the heiress of her husband or her father represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life-estate.

Adverse possession against the defaulter, whether for the statutory period or for a lesser period, does not bind the purchaser of a share, who is not a person claiming from or through the defaulter.

It is not the right, title and interest of the previous owner of the share which pass to the purchaser under section 54, but the share as recorded in the Collector's book, on which the revenue is assessed.

The words "shall not acquire any rights" in section 54, Bengal Land Revenue Sales Act, refer to the acquisition of rights in respect of interests, such as incumbrances or the like, which are referred to in the previous phrase of that section. **C.** KHEMESH CHANDRA *v.* ABDUL HAMID 350

——————— **s. 54** 350

Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s. 8 (2) 935

Bengal Tenancy Act (VIII of 1885) 563

——————— **s. 22,** *proviso, scope of—Raiyati interest, merging of, into landlord's by sale—Arrears of rent, sale for—Landlord, purchase by—Under-*raiyat's *right, how long remains.*

Though the *raiyati* right merges into that of the superior landlord by the sale of the holding for arrears of rent and its purchase by the landlord, the right of an under-*raiyat* does not cease but remains alive till he is evicted by law, according to the proviso of section 22 of the Bengal Tenancy Act. **C.** ANANT PRASAD SINGH *v.* H. MANNERS 459

——————— **ss. 30, 101, 111,** *scope of—Rent, enhancement of, alteration of, suit for—Local area, meaning of.*

A suit for enhancement of rent under section 30 of the Bengal Tenancy Act and a suit of the nature described in section 52, are included in the expression 'suit for alteration of rent' in section 111.

Under section 101 of the Bengal Tenancy Act, an entire district is included in the meaning of the term 'local area', although an area smaller than an entire estate or country as a whole is usually meant by the term 'local'. **C.** BROJENDRO KISHORE RAI *v.* KHALIL NAGARCHI, 21 C. L. J. 489 885

——————— **s. 38**—*Abatement of rent—Existing conditions—"Permanent," interpretation of—Deterioration—Land covered with sand, whether permanent deterioration.*

A more liberal interpretation must be put on the word "permanent" in section 38 of the Bengal Tenancy Act and it must be construed with reference to existing conditions.

Bengal Tenancy Act—contd.

Thus where a land is covered with sand the deterioration is permanent with reference to existing conditions. **C.** KRISHNA SAHAI *v.* PALAKDHARI RAUT, 22 C. L. J. 42 256

——————— **ss. 40, 153,** *scope of—Appeal, second—Commutation—Occupancy* raiyat, *advantage of—Revenue Court, decision of, how far affects Civil Court.*

The question of *Bhowli* or *Nagdi* rent is one the decision whereon may be challenged by way of appeal under section 153 of the Bengal Tenancy Act.

The propriety of commutation of rent of a holding or of the amount fixed cannot be called in question in a Civil Court.

A proceeding under section 40 of the Bengal Tenancy Act is founded on the assumption that the tenant whose rent is sought to be commuted is an occupancy *raiyat.*

A decision in a dispute as to the status of the tenant decided by the Revenue Authorities in a commutation proceeding under section 40 is not final and conclusive between the parties, the Civil Court has jurisdiction to go over it. **C.** KALI KRISHNA BAISWAS *v.* RAM CHANDRA BAIDYA, 21 C. L. J. 487; 19 C. W. N. 823 896

——————— **ss. 49, 87**—*Occupancy right, non-transferability of, unless by custom—Notice, necessity of—Re-entry, landlord's right of—Transfer by* raiyat *without consent of landlord.*

Where in the absence of any custom of transfer an occupancy *raiyat* transfers the property to the under-*raiyats*, the landlord has a right to re-enter upon the property.

A notice under section 49 of the Bengal Tenancy Act, to which under-*raiyats* are entitled, is indeed required before ejectment, but that does not apply to a superior landlord who is claiming to re-enter because the occupancy *raiyat* has forfeited his holding by having transferred it without the consent of the landlord.

Section 49 applies where the occupancy *raiyat* still remains in the position of the landlord, not where the occupancy *raiyat* has forfeited his interest by having transferred his interest without the consent of the landlord.

A notice served under section 87 of the Bengal Tenancy Act is not required for the landlord to re-enter in a case like this. **C.** JADAB CHANDRA SARDAR *v.* GOVINDA CHANDRA MANDAL 466

——————— **ss. 49 (b), 85 (2)**—*Lease, perpetual, validity of—Under-*raiyat—*Rent, acceptance of, if ratification.*

Where a *raiyat* grants a lease allowing the lessee to hold the land from generation to generation, and gets rent therefrom, the lease is a nullity, and the acceptance of rent from the lessee cannot effect a ratification of the lease, which is initially void. **C.** MOHIM CHANDRA DEY *v.* BAIDYA NATH, 21 C. L. J. 478 879

——————— **s. 85 (2)** 879

——————— **s. 87** 466

——————— **s. 100,** *Rules made under—Common manager, powers and duties of—High Court, jurisdiction of—Common manager, position of*

Bengal Tenancy Act—contd.

The High Court having made rules under section 100 of the Bengal Tenancy Act, defining the powers and duties of managers, it has power under section 15 of the Charter to superintend and revise the orders of a District Judge.

The position of a common manager under the Bengal Tenancy Act is analogous to that of a Receiver appointed by the Court under the provisions of Order XL of the Code of Civil Procedure, save and except that he is not liable to be sued. **C.** SATYENDRA MOHAN GHOSE *v.* RAJ MOHAN GUHA **177**

——— ——— ——— **s. 101** **885**

——— ——— ——— **s. 104 H** — Record of Rights, preparation of, finality of **437**

——— ——— ——— **s. 106** **122**

——— ——— ——— **s. 106**—*Tenant's right to cut and appropriate trees—Custom, reasonableness of—Question of law—Reasonableness, test for.*

The question whether a custom is reasonable or not is a question of law and not one of fact.

It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber trees on a holding by the tenant.

Where there is nothing unfair or dishonest or contrary to the public good in a custom, the custom is not unreasonable. **C** GURAI KAR *v.* KAURMONI SINGHA, 19 C. W. N. 1188 **312**

——— ——— ——— **ss. 109, 106,** *scope of—Revenue Court's duty as to fair rent—Suits in Civil Court, bar of—Revenue and Civil Courts, jurisdiction of—No forfeiture for mistake in selecting one Court for another.*

Under the provisions of section 109 of the Bengal Tenancy Act, the decision of a Settlement Officer or rather a Revenue Court, with reference to what is the fair and equitable rent, is binding and conclusive and the tenants are not entitled to question that decision in any Civil Court, provided that the question in the Civil Court is concerning any matter which is or has clearly been the subject of an application made under sections 105 to 108 of the Bengal Tenancy Act.

The duty of a Revenue Court is limited to the inquiry as to what is the fair rent, having regard to the entry that appears on the Record of Rights and, therefore, section 109 of the Bengal Tenancy Act is no bar to a suit by a tenant for a declaration that the lands are either *lakheraj* or are held at fixed rates. Section 106 of the Bengal Tenancy Act does not exclude the right of a Civil Court. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special Tribunal, that necessarily excludes the jurisdiction of the ordinary Courts of the country.

A person, because he went to a Civil Court instead of going to a Revenue Court, is not liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. **C.** SHASHI BHUSAN *v.* ESABAR ALI, 19 C. W. N. 636 **122**

——— ——— ——— **s. 111** **885**

——— ——— ——— **s. 111A** **437**

Bengal Tenancy Act—contd.

——— ——— ——— ——— **s. 149 (3),** *scope of—Arrears of rent, suit for—'Money,' meaning of—Apportionment, question of.*

In a suit for arrears of rent against a tenant, the money mentioned in sub-section (3) of section 149 of the Bengal Tenancy Act is the entire sum deposited into Court under sub-section (1) and no question of apportionment between rival claimants to proprietorship of the tenancy is intended to be raised or decided under the section.

Where it is admitted by the tenant defendant that part at any rate of the sum deposited is due to the defendant-landlord but the precise part so due is not determined:

Held, that section 149 of the Bengal Tenancy Act has no application, the question of apportionment being not within the scope of the suit. **C.** AMBICA CHARAN BEPARI *v.* ASWINI KUMAR, 21 C. L. J. 485 **883**

——— ——— ——— **s. 153** **896**

——— ——— ——— **, (amended by Act I of 1908), s. 153,** *proviso and explanation, scope of—Sale—Irregularity—Question relating to title or some interest in land Civil Procedure Code (Act V of 1908), O. XXI, r. 90, order under, whether appealable—Irregularity and fraud in publishing or conducting a sale.*

Per *N. Chatterjea, J.*—Under Explanation to section 153 of the Bengal Tenancy Act (Eastern Bengal and Assam Tenancy Act) a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto.

The question whether, or not, a case comes under the proviso to section 153, Bengal Tenancy Act, is to be determined by the Appellate Court not with reference to the question which may be raised in appeal, but with reference to the question decided by the order of the Subordinate Court.

An order setting aside or declaring to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to section 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section.

An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of the sale.

Section 153, Explanation, applies only to cases where there is a question as to irregularity in publishing or conducting a sale.

An application to set aside a sale made by a person (who prior to the sale had purchased the holding) more than a month after the sale comes within section 47 of the Civil Procedure Code and is not time-barred, section 18 of the Limitation Act being applicable to the circumstances of the case.

A question as to fraud in publishing or conducting a sale is not covered by the Explanation to section 153 of the Bengal Tenancy Act.

Bengal Tenancy Act—contd.

Per *Mullick, J.*—An irregularity in publishing or conducting a sale may be accompanied with or without fraud.

Section 153, Explanation, does not expressly exclude from its scope an irregularity tainted by fraud. **C.** NOBIN CHANDRA *v.* BEPIN CHANDRA ROY, 19 C. W. N. 953; 22 C. L. J. 244 **308**

——— ——— ——— **s. 171,** *scope of—Construction—Sum paid to avert rent-sale not considered part of mortgage-money—Transfer of Property Act (IV of* 1882), *s.* 83, *scope of—"Money remaining due on mortgage", what includes.*

Whatever construction may be put on section 171 of the Bengal Tenancy Act, it cannot mean that the sum paid for the protection of the property becomes part of the mortgage-money.

In view of the specific provisions of section 171 of the Bengal Tenancy Act, the money paid to avert the rent sale does not become part of the mortgage-money so as to entitle the mortgagee to treat it as included in the amount remaining due on his mortgage under section 83 of the Transfer of Property Act. **C.** MANMATHA NATH *v.* SARAT CHANDRA ADDY, 21 C. L. J. 429 **929**

——— ——— ——— **s. 174**—*Deposit to be made by judgment-debtor himself—Transferee, whether can make a valid deposit.*

A deposit made under section 174 of the Bengal Tenancy Act must be made by the judgment-debtor himself and by no other person. A transferee of the judgment-debtor does not come under the section. **C.** SURENDRA NARAYAN SINGH *v.* LACHMI KOER **840**

——— ——— ——— **s. 182** **859**

——— ——— ——— **s. 186A,** *scope of—Denial of landlord's title, by tenants, effect of—Landlord, if can sue for recovery of possession*

Section 186A of the Bengal Tenancy Act does not apply to a case brought by a landlord in a Civil Court for possession when the tenants thereof have successfully denied the landlord's title in a rent suit. **C.** PROSONNO KUMAR *v.* KULADA PROSAD **472**

——— ——— ——— **Sch. III, Art. 2**—*Limitation Act (IX of* 1908), *s.* 29, *Sch. I, Art.* 116—*Arrears of rent, suit to recover—Agricultural land, lease of, for agricultural purposes—Transfer of Property Act (IV of* 1882), *s.* 107.

In a suit for arrears of rent the rent that was in arrears and was sued for, was for the year 1313 B. S. under a first *kabuliat*, and for the years 1313-1318 B. S. under a second *kabuliat*. The defendant's estate was taken charge of by the Court of Wards on the 11th November 1908, and whilst his estate was under their charge the Collector gave an acknowledgment in writing on the 20th September 1910 with respect to the rent now sued for:

Held, per *Fletcher, J.*, that the rent sued for the year 1313 was barred by limitation, as the case came under the Bengal Tenancy Act, and the leases were found to have been granted for agricultural purposes.

The Bengal Tenancy Act does not apply to leases of agricultural land which are not for agricultural purposes.

Per *Richardson, J.*—Where a lease relates to agricultural land but is not a lease for agricultural purposes, it is clearly governed by the Transfer of Property Act. Such a lease can only be made under section 107 by a registered instrument.

Where a lease appears to be in substance a temporary lease granted to a rent-farmer or middleman and relates to agricultural lands, there is no question of any conflict between the Bengal Tenancy Act and the Transfer of Property Act or of applying any provision of the latter Act.

Section 29 of the Limitation Act contains a saving clause in regard to special and local laws.

Whether a lease of agricultural land is or is not a lease for agricultural purposes the Bengal Tenancy Act applies, and the period of limitation applicable is that provided by that Act. **C.** RASH BEHARI LAL MANDAL *v.* TILUCKDHARI LAL **797**

——— ——— **Sch. III, art. 3** **859**

Bengal Tenancy Amendment Act (I of 1907), s. 31 (a), *scope of—Rent, enhancement of—"Prevailing rate," meaning of.*

Per *Sharfuddin, J.*—The 'prevailing rate' is not the average rate of rent of neighbouring villages

Where it is found that there is no prevailing rate in the neighbouring villages, no decree for enhancement can be given.

Where the provisions of section 31 (*a*) of the Bengal Tenancy Act are not extended, the principles of the prevailing rate cannot be applied.

Per *Coxe, J.*—Where the great majority of the *raiyats* are found to pay at the rate of Rs. 4 and over in the neighbouring villages:

Held, that Rs. 4 and over is not a rate at all, much less a prevailing rate, unless the artificial construction contained in section 31 (*a*) is placed on that expression.

It is not the intention of the Legislature that section 31 (*a*) should apply in a district to which it is not formally extended, however reasonable the provisions of that section are. **C.** RAM DEO SINGH *v.* MOHESWAR PROSAD, 21 C. L. J. 483 **880**

Betrothal Contract. *See* MUHAMMADAN LAW.

Bombay District Municipal Act (III of 1901), s. 167 **597**

Bombay Land Revenue Code (Act V of 1879), s. 37 **51**

——— ——— **ss. 65, 66**—*Land used as a graveyard and also as a wood store Possession and user for over* 50 *year without paying any assessment—Order of eviction, whether legal—Suit to set aside order—Limitation Act (IX of* 1908), *Sch. I, Art.* 14.

The land in dispute was used as a graveyard and also for storing wood by the plaintiffs, who had been in undisturbed possession of it ever since 1860 in their own right without paying any assessment. In 1907 the District Deputy Collector ordered the *mamlatdar* "to cause the building and the wood to be removed forthwith from the said land" and the order was confirmed on appeal by the Commissioner in April 1909. On the 22nd February 1910 the plaintiffs sued the Secretary of State for India in Council for the declaration that they were the owners of the land, for a cancellation of the order and for a perma-

Bombay Land Revenue Code—concld.

nent injunction against the defendant to prevent any obstruction being caused to them in the enjoyment of the property:

Held, (1) that in view of the long undisturbed possession of the plaintiffs the order of eviction was *ultra vires*.

(2) that the suit was not barred by Article 14 of the Limitation Act. **B.** RASULKHAN *v.* SECRETARY OF STATE, 17 BOM. L. R. 513: 39 B. 491 **490**

——— ——— ——— **s. 66** **490**

Bombay Mamlatdars' Courts Act (II of 1906), s. 23—*Collector, whether includes District Deputy Collector—High Court's power to revise.*

A District Deputy Collector has no authority to pass an order under section 23 of the Mamlatdars' Courts Act of 1906.

Where a District Deputy Collector has assumed to act judicially, he will be treated as a Court under the superintendence of the High Court whose proceedings can be revised under the extraordinary jurisdiction. **B.** SONU JANARDAN KULKARNI *v.* ARJUN BARKU KUNBI, 17 BOM. L. R. 579 **954**

Bombay Matadars Act (VI of 1887), s. 9—*Death of representative Matadar—"Heir next in succession," how determined.*

On the death of a representative Matadar, the heir next in succession is ascertained in the first instance by reference to the personal law of the parties. **B.** DAHYA KHUSAL *v.* BAI BHIKHI, 17 Bom. L. R. 504; 39 B. 478 **500**

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), ss. 6, 7, 10—*Evidence Act (I of 1872), s. 125—Criminal Procedure Code (Act V of 1898), s. 342—Complaint on which special warrant issued—Right of accused to have it produced at trial—Extent of privileged nature of such complaint—Power of Magistrate to examine as witnesses persons* challaned *by Police as accused persons under Gambling Act—Special procedure—General procedure.*

A Magistrate has power to examine as witnesses persons arrested and brought before him under section 6 (*b*). The whole procedure of the Gambling Act being a special procedure overrides the general law of procedure enacted in section 342, Criminal Procedure Code, and whenever it is inconsistent with it.

Per *Pratt, J. C.* (*Fawcett, A. J. C. dissenting*).—A complaint under section 6 of the Bombay Prevention of Gambling Act stands on the same footing as a first information of a cognizable offence recorded under section 154, Criminal Procedure Code, or complaint of a non-cognizable offence under section 200, Criminal Procedure Code, and although it is not a necessary part of the evidence for the prosecution, yet it is evidence and the accused have a right to call for it, and if the warrants are challenged, their production would be necessary.

Section 125 of the Indian Evidence Act rests upon public policy and it protects the name of a spy or secret informant, not the nature of the information and it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings.

Bombay Prevention of Gambling Act—concld.

Per *Fawcett, A. J. C.*—The Bombay Act requires the complaint to be on oath merely as an additional guarantee of the truth of the complaint. It is not intended to imply that the complaint is a document on which proceedings against any persons that may be arrested under the warrant are based. These proceedings are based on the fact of the arrest of the accused and their production before the Magistrate and not on the complaint which is merely the basis of the warrant which leads to their arrest

The rule stated in section 125, Evidence Act, is clearly applicable and appropriate in regard to gambling cases and, therefore, a Magistrate is perfectly right in refusing to order the production of the complaint under section 6 of the Bombay Act (IV of 1887). **S.** LILADHAR UMERSI *v.* EMPEROR, 8 S. L. R 309 **79**

Breach of Trust. *See* PENAL CODE, s. 405.

Buddhist Law—Husband and wife—*Wife's interest in joint property affected by mortgage executed by husband alone—Wife's conduct and acquiescence—Estoppel.*

Where a Buddhist couple jointly owned properties but the business was carried on by the husband in his name only and he alone mortgaged the joint properties but the wife knew of the mortgages created by him and acquiesced in them from the beginning:

Held, that the husband had power to bind and did bind the wife's interest in the mortgaged properties.

Where the leases of the sites of certain mills were in the name of the husband alone and where in his business transactions he alone appeared as the rice mill owner and the wife did not say that she was half owner of the mortgaged properties, although she took part in the negotiation of a mortgage:

Held, that the wife was estopped from pleading that the mortgage decree passed against her husband alone did not affect her interest in the mortgaged property as she was not a party to the suit. **L. B.** MA TIN ME *v.* MAUNG MAUNG, 8 Bur. L. T. 66 **881**

——— ——— ——— *living separate—Custody of their girl aged seven years Natural guardian—Guardians and Wards Act (VIII of 1890), ss. 9, 17 (1), 19 (b)—Law applicable.*

In a suit by the mother of a Burmese Buddhist girl of seven years to recover her from the custody of her father, the plaintiff's husband, who was living separate:

Held, that the provisions contained in sections 254 to 257 of the Kinwun Mingyi's Digest, Volume II, providing for the custody of children upon divorce of the parents, did not apply where, though the husband and wife lived separate, the marriage status continued and that as guardianship was not one of the matters mentioned in section 13 of the Burma Laws Act, the personal law of Buddhists was not applicable.

Held, also, that according to section 19 (*b*) of the Guardians and Wards Act, the father was the natural guardian of the minor child under the circumstances of the case. **L. B.** MA THEIN ME *v.* MAUNG PO GYWE, 8 Bur L. T. 73 **890**

——— ——— ——— **Inheritance**—*Nearer relatives exclude more remote—Great-grand-daughter, whether can oust her grand-aunts.*

Buddhist Law—concld.

In Buddhist Law the nearer relatives exclude the more remote even in the case of inheritance by direct descendants.

An out-of-time grand-daughter of a predeceased son cannot inherit at all in competition with a daughter.

A widow has no claim to inherit when her husband dies without acquiring any vested rights in the property.

A great-granddaughter is not entitled to inherit in the presence of her grand-aunts. **U. B.** MI KIN MI SAN MIE, 8 BUR. L. T. 51 **741**

——— ——— **Marriage** — *Imprisonment of husband — Desertion — Dissolution of marriage—Right to claim divorce—Right to joint property.*

Under the Buddhist Law there is no authority for holding that a man sentenced to imprisonment is thereby to be deemed to have deserted his wife.

During the imprisonment of the husband, his wife has no right to take a second husband, and if she does so, her conduct amounts to desertion and adultery, and she cannot claim a divorce by pleading the desertion.

The marriage is not dissolved by the desertion but from the day when the first husband on his release from jail demands the joint property from her.

Where the husband treats the marriage as at an end on the ground of his wife's desertion and adultery he is entitled to all the joint property of the parties. **L. B.** AUNG BYU *v.* THET HNIN, 8 L. B. R. 50 **863**

——— ——— **Monk,** *whether can enter into valid contract.*

A Buddhist monk is incapable of entering into a valid contract for his own personal benefit.

Where, therefore, a Buddhist monk sued for redemption:

Held, that he was prohibited by his personal law from buying, selling or mortgaging land and was debarred from suing for redemption. **U. P. B. R.** U. TILAWKA *v.* NGA SAWE KAN, U. B. R. (1915) II, 61 **613**

Burden of proof—Accretions—By gradual, slow and imperceptible means—Small villages—Small river—Large accretions, if by gradual, slow and imperceptible means **278**

——— ——— Ancestral land, whether liable to attachment in hands of widow of deceased proprietor **572**

——— ——— *Benami* transaction — Consideration, payment of **696**

——— ——— *Benami* transaction—Ostensible vendee paying off debts and making ready cash payment **970**

——— ——— Charge created by Hindu widow—Necessity, proof of **54**

——— ——— Common carrier, negligence of **260**

——— ——— Criminal intent—Accused **67**

——— ——— Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required **386**

——— ——— Gift in favour of one member of family—Property treated as joint property **190**

Burden of proof—concld.

——— ——— Inheritance—Custom **7**

——— ——— Legal necessity **926**

——— ——— *Marriage — Suit for declaration that plaintiff was not wife of defendant—Presumption—Divorced woman continues unmarried until proved to have married again.*

The defendant having stated in a criminal case that the plaintiff was his wife, the plaintiff sued for a declaration that she was not the wife of the defendant:

Held, that it was for the defendant to prove that the plaintiff was married to him.

Held, also, that in the absence of an objection on the part of the defendant that the onus was wrongly placed on him by the original Court, the Appellate Court ought not to have shifted it on to the plaintiff.

In the case of a divorced woman the presumption is that she continues unmarried until proved to have married again. **P.** DAULAT *v.* KHAN, 81 P. L. R. 1915; 88 P. W. R. 1915 **194**

——— ——— Permission to make tanks **11**

——— ——— Petition for revocation of patent **904**

——— ——— Right to re-call and cross-examine prosecution witness—Right refused—Prejudice **668**

——— ——— Shamilat—*Sale— Interpretation of sale-deed—Misreading of record—Appeal, second.*

The burden of proving that the land was sold to a party lies heavily on that party where the land is not specifically mentioned in the deed of sale and cannot even be said to be mentioned by implication.

A second appeal is competent when the lower Appellate Court is led to a wrong finding through a misreading of the record on vital matters. **P.** MUHAMMAD NAWAZ *v.* GHULAM HAIDER, 75 P. L. R. 1915 **167**

——— ——— Suit on a lost bond—Admission of execution—Plea of payment **606**

——— ——— Suit for possession of *math* and its property **724**

——— ——— ——— Suit on promissory note—Written contract—Oral agreement—Conditional admission in pleadings—Objection under the section taken for first time in Court of Appeal—Pleadings, amendment of **223**

——— ——— Surety, evidence about fitness of —*Onus*, shifting of **111**

——— ——— Transfer of property or any interest therein by debtor insolvent—Fraudulent preference —Receiver **128**

——— ——— ——— Provincial Insolvency Act (III of 1907), s. 36—Transferee to prove good faith and valuable consideration **814**

——— ——— ——— Waste land—*Melvaram* and *Kudivaram* rights—*Ryot* **634**

——— ——— Will—Custom **382**

Burmese Buddhist Law—*Inheritance—Orasa child.*

Under the Burmese Buddhist Law a daughter no less than a son may be an *orasa* child but there cannot be an *orasa* daughter as well as an *orasa* son in the same family. An *orasa* daughter's position is merely

Burmese Buddhist Law—concld.

presumptive and is liable to be displaced by an *orasa* son of competent age. **L. B.** MAUNG PO HMAN *v.* MAUNG TIN, 8 BUR. L. T. 140 **756**

——————Orasa *son, death of—Younger brother, if becomes* orasa—*Share of* orasa *son—Failure to claim promptly, effect of—Presumption.*

Under the Burmese Buddhist Law if the eldest son tains his majority and fulfils the prescribed conditions and then dies before his parents, his position as *orasa* remains unfilled and the next younger brother does not succeed to it.

If the eldest son reaches the age of manhood before his death, the presumption is that he fulfils the prescribed conditions as *orasa*.

The *orasa* son must exercise his option of claiming a ¼th share promptly; if he fails to do so, he must be held to have abandoned the right. **L. B.** MAUNG KA GU *v.* MA HNIN NGWE **706**

Carriers Act (III of 1865)—*Common carrier, liability of, for loss of goods—Burden of proof—Negligence—Question of law or fact—Appeal, second.*

A common carrier in India is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract.

The burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence.

In order to find whether the question of negligence is a question of law or fact, the rule is that from any given state of facts the Judge must say whether negligence can legitimately be inferred and the Jury, whether it ought to be inferred. In other words, if the contention is that there is no evidence of negligence, the question is one of law; on the other hand, the question whether the evidence is sufficient to justify the inference of negligence is one of fact. **C.** AKHIL CHANDRA SHAHA *v.* INDIA GENERAL NAVIGATION AND RAILWAY CO., LTD., 21 C. L. J. 565 **260**

Cause of action—*Arrears of rent—Re-settlement, arrears after—Cause of action, whether same—Bengal Tenancy Act (VIII of 1885), ss 104H, 111A—Record of Rights, preparation of, finality of.*

A 're-settlement', or new contract of lease, contemplates a new obligation and a new contract to pay new rent and is not the same cause of action as the rent which becomes due under the original contract for letting.

It is not o en to a Court to go behind the Record of Rights to ascertain what, in fact, is the true nature of the tenancy between the parties.

A Record of Rights, prepared during the settlement of Government revenue under the provisions of sections 104H and 111A of the Bengal Tenancy Act, is conclusive, subject to the right of the tenant to bring a suit as mentioned in section 104H (3) of the Bengal Tenancy Act. **C.** BISESHWAR RAY *v.* JUDHISTHIR NATH **437**

Caveat emptor—Promissory note, sale of—Purchaser bound to make enquiries of executant **887**

Central Provinces Municipal Act (XVIII of 1889), s. 66 (5)—*Notice requiring alteration or demolition—Reasonable time—Starting point.*

A notice given by a Municipal Committee requiring a party to alter or demolish a building is bad unless given within a reasonable time.

What is "reasonable time" is determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the duty is to be discharged.

Where a work necessarily spreading over a considerable time is concerned, time should start from its inception. **N.** ABDUL SATTAR *v.* SECRETARY, MUNICIPAL COMMITTEE, 11 N. L. R. 87; 16 Cr. L. J. 532 **660**

Central Provinces Tenancy Act (XI of 1898), s. 88—*Ejectment—Claim by sub-tenant to recover compensation for crops—Jurisdiction of Civil or Revenue Court.*

The method by which a tenant gets compensation for crops raised by him and reaped by the landlord is laid down in section 88 of the Central Provinces Tenancy Act, which is plainly a section, when the ejectment is on a decree for arrears of rent, in relation to the execution of decrees transferred to a Revenue Officer.

An ejectment of a tenant on legal grounds is binding on a sub-tenant, and the sub-tenant is not entitled to any remedy not open to the tenant. His only valid cause of action is as representative of the tenant within the meaning of section 47 of the Civil Procedure Code. **N.** GOPAL DAS *v.* RAMUSA, 11 N. L. R. 105 **836**

Certificate—Succession—Patent error of procedure—Interference in revision—Suit on promissory note assigned by undivided son—Succession certificate, whether necessary—Question of want of certificate raised for the first time in appeal—Appellate Court's duty to give plaintiff an opportunity of producing certificate **234**

Charge. *See* CRIMINAL PROCEDURE CODE, s. 225.

Charter Act (24 & 25 Vic. c 104), s. 13 **846**

——————s. 15 **109**

Cheating. *See* PENAL CODE, s. 415.

Chota Nagpur Encumbered Estates Act (VI of 1876), ss. 3, 12, 32—*Manager, order of, effect of—Civil Courts, jurisdiction of, while estate held by Revenue Authorities—Interest, accumulation of, rendering estate insolvent—Deputy Commissioner's work—Manager, power of, to render interest on original debt.*

Where the Manager of an encumbered estate is the principal necessary party and there is no allegation that he, in making the order he did in pursuance of the Chota Nagpur Encumbered Estates Act, was not acting *bona fide*:

Held, that section 22 of the Act will alone bar the suit.

It is clear from the provisions of sections 3 and 12 and other sections of the Act that during the time that an estate is held by the Revenue Authorities under the Act, a Civil Court has no jurisdiction to interfere on a suit trought by the creditors. The creditors have their remedy against any order of

Chota Nagpur Encumbered Estates Act—concld.

the Manager before the Deputy Commissioner and the Commissioner.

Where the Manager finds that the accumulation of interest, whether under a Civil Court decree or under any other kind of debt, would render the estate insolvent, he must at once get the Deputy Commissioner to release the estate.

If, therefore, the Manager does not possess the power to reduce the interest on the original debt as contracted, the operation of the Act would not only frequently but in every case prove infructuous. **C.** HIRANAND OJHA *v.* SATISH CHANDRA ROY **420**

——— ——— ——— **ss. 12, 22** **420**

Chur *land formed in bed of river—Consent decree, nature of, how far binding—Consent decree and compromise, compared—Contract of parties, nature of—Head of family, decree against, how far binding—Map drawn for a different purpose, how far affects rights of property—Survey map and* thak *map distinguished Submerged lands, possession of, presumption of—Limitation—Adverse possession—Constructive possession does not apply to a wrong-doer.*

A consent decree is just as binding on the parties thereto as a decree after a contentious trial.

A consent decree cannot have greater validity than the compromise itself.

A consent order is only an order of the Court carrying out the agreement between the parties.

A contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge.

A decree obtained against the head of a family in a suit to which the other members are not parties may be operative against the latter under certain circumstances; but this principle clearly does not apply unless it is shown that the matter was one in which the member sued was entitled to represent the whole family.

The rights of property as between two parties cannot be affected by a map drawn for a different purpose, a purpose not relevant to the subject of the dispute between them.

Although the survey officers have at their disposal means of more accurate measurement than the *thak* officers have, yet no hard and fast rule can be laid down that a survey map is more reliable than a *thak* map. The true principle is that the map which more clearly agrees with the local land-marks, is the one that should be followed.

The rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, the only point for investigation in such cases is the period of time when the lands re-appeared and became fit for occupation.

Where it is found that the possession of the defendants, after re-formation of the disputed lands, has not extended over the statutory period, the claim of the plaintiffs is not barred by limitation in respect of lands which lie within the *thak* boundaries of the *churs*.

The theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession. **C.** AMIRTA SUNDARI *v.* SHERAJUDDIN AHAMED, 19 C. W. N. 565 **156**

Civil Procedure Code (Act XIV of 1882), s. 373 **24**

——— ——— ——— **s. 375**—*Adjustment of suit—Interpretation—Agreement not to execute decree previous to decree, effect of.*

An agreement not to execute a decree, if effect is sought to be given to such agreement in execution proceedings, must be a transaction between the parties subsequent to the decree and not one which would make the decree itself void as being in its contravention.

The words 'adjustment of a suit' in section 375, Civil Procedure Code, refer not only to the form in which the decree is to be drawn up but also the manner in which the rights of the parties are to be enforced in the execution proceedings or that suit. Therefore, under section 91 of the of the Evidence Act, on extraneous evidence, oral documentary, regarding the terms of the compromise is admissible in that suit and its execution proceedings. **N.** HUKAM CHAND *v.* RADHA KISAN 11 N. L. R. 110 **838**

——— ——— ——— **s. 583**—*Application for restitution—Reversing decree, whether contains direction to restore any benefit received—Civil Procedure Code (Act V of 1908), s. 144, scope of.*

Applications made to obtain restitution under section 583 of the Civil Procedure Code, 1882, are proceedings in execution of the appellate decree, which the successful party has the right to treat as containing a direction to the other party to restore whatever benefit the latter has derived through execution under the reversed decree.

A decree for restitution passed in favour of a person in 1907 cannot be deemed to have ceased to exist in 1909 and can be executed whether an order of the first Court directing such restitution has been passed or not.

Section 144 of the new Civil Procedure Code does not apply to decrees passed before the Code came into force. **M.** MUNICIPAL COUNCIL, KUMBAKONAM *v.* SADAGOPACHARIAR **380**

——— ——— ——— **ss 624, 626, 629**—*Review of judgment—"Strict proof", meaning of—Objections—Proper safeguards—Formalities—Sufficiency of proof—Appellate Court's jurisdiction.*

Per *Jenkins, C. J.*—"Strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality which is prescribed and not the result that is described.

Section 629 of the Code of Civil Procedure, Act XIV of 1882, limits the grounds on which objections may be taken to the admission of a review; an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a tribunal that has no power to grant it.

Without proper safeguards, the Court of first instance is, the proper Court to determine whether or not there should be a review, but before a review is granted those safeguards must be observed.

Per *Woodroffe, J.*—The term 'strict', Order XLVII, rule 2 (*b*), refers to formalities, such as issue of notices, taking of evidence on oath

Civil Procedure Code—(1882)—concld.

or affirmation, legal proof of documents, cross-examination, and so forth. If such legal evidence be wanting objection may be made in appeal under Order XLVII, rule 7, which does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review.

"Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction.

Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, but the question of sufficiency of evidence is for the Court admitting the review. **C.** ABED KHONDKAR *v.* MOHENDRA LAL, 19 C. W. N. 804; 42 C. 830 **282**

——— ——— ——— **ss. 626, 629 282**

Civil Procedure Code (Act V of 1908), ss. 2 (2), 36, 47—*Decree—'Matters in controversy', meaning of—Orders dismissing application to sue* in forma pauperis *and awarding day costs, whether amount to decrees and are appealable.*

The term 'matters in controversy' in section 2 (2) of the Code of Civil Procedure, 1908 must not be understood as relating solely to the merits of a case. It would cover any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other matters preliminary, which necessitate an adjudication before a suit is enquired into, in fact all questions concerning a *pending suit*. It does not, however, include an order passed on an application preliminary to the institution of the suit itself, such as an application for leave to sue, and proceedings passed in execution in regard to such orders as well as orders granting day costs are not appealable as they do not come within the scope of section 47, Civil Procedure Code, although such orders can be executed under section 36, Civil Procedure Code. **M.** ANKALA VENKATA REDDY *v.* MANCHALA VENKATA REDDY, 2 L. W. 519; 17 M. L. T. 447 **393**

——— ——— ——— **s. 9**—*Specific Relief Act (I of 1877), s. 42—Suit for declaration to post of Honorary Secretaryship to an association, maintainability of.*

Where the plaintiff sues for a declaration that he is the Honorary Secretary to an association and that a resolution passed at a meeting of the association dismissing him from the secretaryship is null and void:

Held, that he is bound to satisfy the Court that the suit is one concerning the right to an office within the meaning of section 9 of the Civil Procedure Code, and also that what he is enforcing in the suit is his right to a certain 'legal character' within the meaning of section 42 of the Specific Relief Act.

Where the plaintiff's services to an association are voluntary and gratuitous and where there is no question of any contract between him and its Board of Trustees, the Civil Court has no jurisdiction to entertain the suit. **A.** MAHARAJ NARAIN SHEOPURI *v.* SHASHI SHEKHARESHWAR ROY, 13 A. L. J. 455; 37 A. 313 **53**

——— ——— ——— **s. 11**—Title derived from a party, nature of—No issue raised or tried—No bar—Co-defendants **464**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 11, O. II, r. 2**—Res judicata—*Relinquishment of relief—Relief claimed but not granted—Direction to file separate suit for it—Objections to attachment and sale of immoveable property rejected summarily—Suit for recovery of property sold—Limitation Act (IX of 1908), Sch. I, Arts.* 11, 144.

Where a Court expressly declares (rightly or wrongly) that it is not competent in a particular suit to grant a specific relief claimed therein and directs the plaintiff to take separate proceedings to achieve his purpose, his subsequent suit to get that relief is neither barred by the rule of *res judicata* under section 11 nor by rule 2 of Order II of the Code of Civil Procedure, 1908.

Article 11 of Schedule I of Act IX of 1908 does not apply where objections to the sale of the property are not investigated but are summarily rejected by the Executing Court, and a suit for recovery of the property thus illegally sold in execution of a decree can be brought at any time within 12 years under Article 144 of the Act from the date on which the cause of action accrued. **P.** MUHAMMAD BAKHSH *v.* BALKISHAN, 72 P. W. R. 1915; 160 P. L. R. 1915 **731**

——— ——— ——— **s. 11, O. II, r. 2**—*Suit for resumption of rent-free grant—Land found not resumable—Rent or revenue not assessed—Provisions of s. 153, Agra Tenancy Act (II of 1901), not given effect to—Fresh suit to assess rent, if barred*—Res judicata.

A suit for resumption of a rent-free gran was brought and dismissed on the ground that the land was not resumable. In that suit, rent or revenue was not assessed as required by section 153 of the Agra Tenancy Act, II of 1901. A fresh suit was brought to assess rent and it was pleaded (1) that it was *res judicata* under section 11, Civil Procedure Code, (2) that the suit was barred under Order II, rule 2:

Held, overruling the contentions, that the suit was maintainable. **U. P. B. R.** UDAI RAM *v.* COURT OF WARDS, ALIGARH **678**

——— ——— ——— **s. 11, O. XXXII, r. 15**—*Suit for possession—Plea of insanity—Decree—Suit for declaration that decree not binding*—Res judicata.

The defendant sued the plaintiff for the possession of certain property, the subject-matter of a sale-deed executed by the plaintiff. The plaintiff pleaded that he was of weak intellect and that advantage had been taken of him and that he had not received the consideration. The Court found against the plaintiff and decreed the defendant's suit. The plaintiff then brought the present suit to have it declared that the decree in the former suit was not binding on him as he, being of unsound mind, had not been properly represented:

Held, that the plaintiff, not having been adjudged a person of unsound mind at the time of the previous suit, was a party to that litigation, and was bound by the result. **A.** BISHRUP *v.* NIL KANTH, 13 A. L. J. 562 **595**

——— ——— ——— **s. 11, Expl. IV**—*Set-off, claim of, not put forward—Subsequent suit for that amount, whether barred*—Res judicata.

Civil Procedure Code—(1908)—contd.

A defendant who can claim set-off is not bound to put forward his claim in answer to the suit against him, and his failure cannot take away his right to sue for the amount subsequently. **M.** PICHI AIYAR *v.* SUBBARAYAR, 28 M. L. J. 513 **34**

——— **ss. 24 (1) (b), 148** —*Civil Rules of Practice, r.* 161A—*Transmission of decree for execution by one Court to another—Transmission of that decree to another Court—No steps taken for six months to execute decree—Proceedings thereafter, whether void.*

Where a public officer is directed by a Statute to perform a duty within a specified time, the provisions as to time are only directory. In considering whether a Statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms.

In deciding whether a rule is mandatory or directory, the possibility of justice suffering from a too rigid application of the time limit should be taken into account.

A Court has under section 24, clause (1) (*b*) of the Civil Procedure Code, power to withdraw to its own file a transmitted execution proceeding and to dispose of it.

An omission to take within six months steps to execute a transmitted decree does not render the proceedings taken after six months infructuous and void *ab initio*. In such cases time is not of the essence of the stipulation.

Rule 161A of the Civil Rules of Practice, Madras, is a rule, of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute the decree. It is directory in its nature, and not mandatory. **M.** VELLIAPPA CHETTIAR *v.* SUBRAHMANIYAM CHETTY, 29 M. L. J. 172 **119**

——— **ss. 36, 47** **393**

——— **ss. 47, 151, O. XXI, r. 16**—*Application for execution by transferee of decree—Notice to parties—Decree set aside—Execution—Procedure not given.*

An *ex parte* decree obtained in a mortgage suit was transferred but the transferee neither got his name substituted in the place of the decree-holder nor was any notice under Order XXI, rule 16 of the Civil Procedure Code, served either upon the decree-holder or upon the judgment-debtor. The judgment-debtor applied to set aside the *ex parte* decree making only the decree-holder party to it. The decree-holder failed to appear and the *ex parte* decree was set aside. The transferee of the decree thereafter applied for execution:

Held, that the transferee could not proceed with the execution before the order setting aside the *ex parte* decree was set aside;

that the Court could not set aside the order setting aside the *ex parte* decree under section 151, Civil Procedure Code. **C.** BONOMALI BANIKYA *v.* JOY KUMAR BAIDYA **673**

——— **ss. 47, 73, O. XXI, r. 52**—*Decree obtained by fraud or collusion, question of, whether relates to execution of decree—Attachment, whether gives any priority—Rateable distribution.*

Civil Procedure Code—(1908)—contd.

The question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree and can only be raised by a separate suit.

Section 73 of the Civil Procedure Code applies where a judgment-creditor makes application in the prescribed form under Order XXI, rule 10, Civil Procedure Code, to the Court by which assets of the judgment-debtor are held, for the execution of his decree before the receipt of those assets by the Court.

An applicant for execution of his decree does not acquire any priority by virtue of his attachment and the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. **M.** SUIKEENA KATUM *v.* MUHAMMAD ABDUL AZIZ, 38 M. 221 **239**

——— **s. 47**—*Execution of decree—Sale—Minor widow brought on record as legal representative of her deceased husband, judgment-debtor—Court kept in ignorance of minority of widow—An earlier and higher bid for same property in another suit concealed—Sale void—Suit for declaration competent without regard to s.* 47—*Fraud—Limitation Act (IX of* 1908), *Sch. I, Arts.* 12, 166 *applicability of.*

In a suit for a declaration that the sale in execution of a decree was not binding on the plaintiff, the main objection to the sale was that at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record as the legal representatives of the judgment-debtor, their deceased husband, and at the date of the sale, the plaintiff was a minor, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major, though the 1st defendant-decree-holder and the 3rd defendant, the auction-purchaser, both knew that she was a minor. The Court was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down:

Held, that the plaintiff, who had no guardian *ad litem* at all, had not been a party to the suit, and that she was entitled to bring the present suit to declare it as not binding on her without regard to the provisions of section 47, Civil Procedure Code;

that the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, inasmuch as the other widow also had ceased to have any interest in the estate, the sale was not binding on the plaintiff, and did not require to be set aside;

that the plaintiff was entitled to a decree, as the Court-auction sale was brought about by the fraud of the decree-holder and Court-auction-purchaser;

that the declaratory suit having been brought within three years of the plaintiff's attainment of majority was not barred, Articles 166 and 12 of the Limitation Act being alike inapplicable. **M.** PASUMARTI PAYIDANNA *v.* GANTI LAKSHMINARASAMMA, 28 M. L. J. 525 **314**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ss. 47, 65, O. XXI, r. 94—*Execution sale—Co-owner's interest—Auction-purchaser, assignee of—Title, acquisition of—Partition, right of—Limitation Act (IX of 1908), Sch. I, Art. 144, applicability of—Adverse possession—Co-owner's possession.*

An assignee of the interest of a decree-holder-purchaser of his judgment-debtor's right in a joint property, acquires title under section 65 and Order XXI, rule 94, of the Civil Procedure Code and as such is entitled to bring a suit for partition against the judgment-debtor and his other co-owners without obtaining any formal delivery of possession and his suit is not barred by section 47 of the Civil Procedure Code.

A purchaser at a Court sale in order to obtain possession of the property purchased may seek for such possession as he can obtain under the Civil Procedure Code or may ignore the provisions of the Code and stand upon his general rights of prosecuting his claim by instituting a suit.

Article 144 of Schedule I of the Limitation Act applies to a suit for partition between tenants-in-common, although a tenant has acquired his rights by purchase at a Court auction.

In such a suit there can be no question of adverse possession, because the possession of one co-tenant is the possession of all persons entitled as tenants-in-common. **M.** HASSAN AMMAL BIBI *v.* ISMAIL MOIDEEN, 28 M. L. J. 642; (1915) M. W. N. 414 **576**

——— ——— ——— ss. 47, 73, 104—*Mortgage-decree making judgment-debtor personally liable for deficiency—Sale of other properties belonging to him—Application by decree-holders for rateable distribution—Order, whether appealable—Execution application praying for specific reliefs—No final orders passed—Madras Civil Rules of Practice, r.* **167.**

A party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure, should not be deprived of it unless the Civil Procedure Code expressly denies it to him.

Orders passed under section 73 of the Code of Civil Procedure are appealable if they affect parties to the suit especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by clause (2) of section 73.

Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor, are decrees "*for the payment of money*" within the meaning of section 73 of the Code and entitle the mortgagee to apply for rateable distribution under that section.

Execution applications praying for specific reliefs which were all granted several years before assets were realised and on which no further reliefs could be asked or granted, are still on the file and undisposed of if no final orders have been passed taking them off the file of pending applications.

Rule 167 of the Civil Rules of Practice, Madras, contemplates final orders being passed by the Court on a petition after the sale has been confirmed.

An objection that the decrees passed are not in accordance with law, cannot be raised in execution proceedings **M.** VENKATAPERUMAL *v.* VENKATA REDDI, 1915) M. W. N. 334; 17 M. L. T. 427; 29 M. L. J. 96 **231**

Civil Procedure Code—(1908)—contd.

——— ——— ——— s. 47 (2) **905**

——— ——— ——— s. 48 **237**

——— ——— ——— s. 48—*Mortgage-decree making mortgagor "personally liable for balance due under the decree" after sale of mortgaged property, whether a decree for "payment of money" on a certain date—Twelve years to be calculated from date of decree or from date when sale-proceeds prove insufficient to satisfy decree—Decree against estate managed by Court of Wards—Decree not transferred to Collector for execution—Mortgagee, whether entitled to benefit of exclusion of period of management by Court of Wards.*

A mortgage decree directing that the "defendants be personally liable for any balance not obtained by such sale," is not a decree for payment of money on a certain date within the meaning of clause (1) (*b*) of section 48 of the Code of Civil Procedure, and the period of twelve years under that section must be calculated *from the date of the decree*, and not from the date when the sale-proceeds of the mortgaged property prove insufficient to satisfy the decree and the balance is ascertained.

A mortgagee holding a decree against an estate under the management of a Court of Wards is not entitled to the benefit of exclusion of the period of management by the Court of Wards, when the decree itself was not transferred to the Collector for execution. **M.** VENKATA PERUMAL *v.* PRAYAG DOSSJEE **556**

——— ——— ——— s. 54—*Execution referred to Collector—Application to Civil Court to expedite execution, whether execution application—Power of Court to control Collector's proceedings.*

An application to a Civil Court to expedite and authorize the Collector to revive and continue old execution proceedings referred to him for execution by that Court and still pending before him, is not an application for execution and the bar of limitation does not apply to it.

A Civil Court is competent to entertain such an application as it has a right of control over the Collector's proceedings in execution. **S.** HARUN KHAN RAHIM KHAN *v.* TEJUMAL PARIOMAL, 8 S. L. R. 335 **58**

——— ——— ——— s. 60 (1) (n) **578**

——— ——— ——— s. 63 **21**

——— ——— ——— ss. 63, 73—*Execution proceedings—Decree-holders of different Courts attaching in execution same property, right of, to rateable distribution—Court of highest grade—Transfer of decree.*

Under section 63 and 73, Civil Procedure Code, all the holders of money-decrees who have attached the property of their judgment-debtor in execution in several Courts before the actual receipt of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it. **L. B.** MA NYEIN HTA *v.* MAUNG GYI **21**

——— ——— ——— s. 65 **976**

——— ——— ——— s. 66 **716, 787**

——— ——— ——— s. 66—Benami *purchase—Purchase by one of the decree-holders—Suit by other decree-holder against purchaser, maintainability of.*

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Civil Procedure Code—(1908)—contd.

In execution of a simple money-decree held by two persons jointly, a certain *zemindari* property of the judgment-debtor was put up to sale and was with the permission of the Court purchased by one of the decree-holders in 1902. The purchaser was put in formal possession of the property in 1903. In 913, the other decree-holder brought a suit against the purchaser and claimed possession of a share in the property, alleging that in accordance with an oral agreement the purchase was for the benefit of both the decree-holders:

Held, that the suit was barred by the provisions of section 66 of the Code of Civil Procedure. **A** SALLE *v.* MOHAN LAL **447**

——— ——— ——— **s. 66**—*Purchase in Court auction as* benamidar—*Agreement by purchaser to execute sale-deed in favour of plaintiff—Suit, whether maintainable.*

A suit for execution of a sale-deed and for recovery of possession on the ground that the defendant's father purchased the suit properties as *benamidar* for the plaintiff, falls within the scope of section 66 of the Civil ProcedureCode and is barred. **M.** SUBRAMNIAM PILLAI *v.* GOPALARAMA SUBRAMANIA **138**

——— ——— ——— **s. 70**—*U. P. Government Rules under section* 70, *rr.* 30 31, 32—*Execution—Power of Assistant Collector to order prosecution—Jurisdiction—Penal Code* (*Act XLV of* 1860), *s.* 182.

An Assistant Collector has no powers of either Civil, Revenue or Criminal Court while receiving an application under rule 30 of the rules framed by the U. P. Government under sections 68 and 70 of the Code of Civil Procedure, 1908. Hence if an offence as defined in section 182 of the Penal Code is committed in the course of making the application under the above rule, the Assistant Collector has no jurisdiction to order prosecution. **A** BHAJAN TEWARI *v.* EMPEROR, 13 A. L. J. 479; 37 A. 334; 16 Cr. L. J. 457 **89**

——— ——— ——— ——— **s. 73** **21, 231, 239**

——— ——— ——— ——— **s. 73, O. XXI, rr. 52, 63, O. XXXVIII, rr. 5, 10**—*Attachment before judgment, effect of—Decree-holder, if obtains priority—Other creditors, right of—Declaratory suit, whether maintainable.*

An attachment before judgment confers no right on the party who obtains the order of attachment.

Certain property of a perishable nature was attached before judgment by the defendant and the property was sold and the proceeds deposited in Court The plaintiffs also obtained a decree against the same party and applied for execution by attachment of the money in Court and obtained an order of payment. On the defendant taking objection, the order was cancelled. The plaintiffs then sued for a declaration that they were entitled to the amount of their decree out of the proceeds deposited in Court:

Held, (1) that the priority of attachment gave no priority of title to the defendants who could not, therefore, object to the money being paid to the plaintiffs:

(2) that the plaintiffs were entitled to maintain the suit. **B.** BISHESHAR DAS *v.* AMBIKA PERSHAD, 13 A. L. J. 732 **622**

Civil Procedure Code—(1908)—contd.

——— ——— ——— **s. 73, O. XXXVIII, r. 2**—*Money paid for specific purpose, if available for other creditors under s.* 73—*Money paid on arrest before judgment—Other decree-holders, right of, for rateable distribution.*

Where certain money was deposited in Court under Order XXXVIII, rule 2, on the arrest of the defendant before judgment:

Held, that a lien was created on it in favour of the plaintiff from the time it was deposited and that any other creditors could not claim rateable distribution of the same, as it was money paid for a specific purpose. **U. B.** DOST MAHOMED *v.* SUBRAMANIAN CHETTY, 8 BUR. L. T. 22 **714**

——— ——— ——— **s. 83**—*Alien enemy, suit against—Property of such enemy, how far available in execution.*

The plaintiff sued the defendants, a German Corporation, for an account. On the outbreak of hostilities between England and Germany in August 1914, the question arose whether the plaintiff could continue the suit during the war:

Held, that an alien being amenable to all local laws in consideration of the protection he enjoyed while residing in a foreign territory, there was no reason why he should not be sued or proceeded against in the Courts of India and that the decree against an alien enemy would be effective against his property subject to any rights of the Crown. **S.** HUSSEINI NANDOO *v.* MESSRS. WEICHERS, 8 S. L. R. 329 **22**

——— ——— ——— **s. 92** **840**

——— ——— ——— **s. 92,** scope of reliefs under—*Mutwalli*, appointment of, by founder—*Mutwalli*, when and how can resign *mutwallishup*—Appointment by founder, how far affects original deed of *wakf* **423**

——— ——— ——— **s. 100** **892**

——— ——— ——— **ss. 102, 115**—*Second appeal, maintainability of—Orders passed in execution of decree—Revision, erroneous view of law if ground for*

Section 102, Civil Procedure Code, applies no less to orders passed in execution than to a decree itself.

An erroneous view of the law would not justify interference under section 115 of the Civil Procedure Code. **N.** MANYA *v.* DIWAKAR **740**

——— ——— ——— **s. 104** **231**

——— ——— ——— **s. 105 (2)**—Res judicata—*Estoppel—Test Burden of proof—Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required—Evidence Act* (*I of* 1872), *s.* 90, *presumption in, whether applicable to copies—Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent—Enhanced Government revenue, whether payable by mortgagor or mortgagee.*

Section 105, clause (2), Civil Procedure Code, only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is not whether a decision has been given upon the points raised in the appeal against the order, but whether the party has availed himself of the appropriate remedy of appealing against the order.

Civil Procedure Code—(1908)—contd.

Where the question is as to whether certain property had been demised on *kanom* to the defendants' predecessors-in-title, and the property is conceded to have belonged originally to certain persons, others being recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice to shift the burden of proving title to the defendants.

Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where the title is denied and possession is not shown to have been under the owners.

The presumption contained in section 90, Indian Evidence Act, applies not only to original documents, but also to copies thereof.

The rate of interest allowable on a stale claim for arrears of rent is only 6 per cent.

In the absence of any specific contract to pay interest, or even a period fixed for payment, and in the absence of any demand for the same, no interest is claimable on arrears of rent.

It is the mortgagee in possession and not the mortgagor that is liable to pay the enhanced Government revenue. **M.** NANU NAIR *v.* KANTAN ASHTA MOORTHI, 2 L. W. 509 **386**

——— s. 110 **759**

——— s. 110—*Privy Council appeal—Appeal dismissed for default by High Court—Decree affirming decree of Court below.*

A decree of the High Court dismissing an appeal for default of prosecution is a decree affirming the decision of the Court below within the meaning of section 110 of the Civil Procedure Code. **A.** RAM KARAN *v.* MADHUKAR PRASAD, 13 A. L. J. 623 **409**

——— s. 114 **133, 717**

——— s. 115 **740, 745, 975**

——— s. 115, O. XLI, r. 10—*Appeal, security for—Notice to show cause—Sufficient cause not shown—Dismissal of appeal on that day—Material irregularity.*

Where a notice issued to the appellant to show cause why he should not be required to furnish security before his appeal was heard, does not put the appellant on his guard that the security must be ready in the event of sufficient cause not being shown, the dismissal of the appeal on failure to furnish the security not within a time under ordinary circumtances sufficient for him to furnish is a material irregularity within the meaning of section 115 of the Civil Procedure Code, 1908. **A.** BHOLA NATH *v.* KARTIK PRASAD PANDE **59**

——— s. 115—*Attachment—Claim to attached property—Question of possession not decided—Power of High Court to interfere—Possession in one's own right—Release from attachment.*

Where a Court has disposed of a case without deciding a question (*e. g.*, the question of possession in a claim case) which under the Code of Civil Procedure it is bound to decide for a proper disposal of the case, the High Court will interfere under section 115 of the Code.

Where it was found that the properties attached were purchased in the names of the judgment-debtor and the claimant, that the entire purchase-money was paid by the claimant only, and that he had been in sole possession of the properties for the last ten years or more:

Held, that the claimant was entitled to get the properties released from attachment. **M.** RANGAMMAL *v.* SEVAUGAN CHETTI, 28 M. L. J. 327 **228**

Civil Procedure Code—(1908)—contd.

——— s. 115, Sch. II, cl. 15—*Award, setting aside of—Appeal, maintainability of.*

An order of a Court setting aside an award on the ground of its invalidity on account of misconduct of the arbitrators is appealable. **A.** RAM AUTAR TEWARI *v.* DEOKI TEWARI, 3 A. L. J. 653 **411**

——— s. 115, O. IX, r 9—Ex parte *decree, order setting aside—Revision, maintainability of.*

A revision lies against an order re-admitting a suit which has been dismissed for default **A.** AJODHYA PERSHAD *v.* CHHABILA KOER **1004**

——— s. 115—*Judgment delivered—Formal decree not prepared—Case decided—Appeal allowed—Revision, whether maintainable.*

Where a Subordinate Judge has delivered judgment in a case and all that remains is the preparation of a formal decree, the case must be deemed to have been decided and if an appeal lies against such decree, the High Court would not interfere in revision under section 115 of the Civil Procedure Code. **A.** MOTI LAL *v.* GANGADHAR, 13 A. L. J. 435 **176**

——— s. 115—*Patent error of procedure—Interference in revision—Suit on promissory note assigned by undivided son—Succession certificate, whether necessary—Question of want of certificate raised for the first time in appeal—Appellate Court's duty to give plaintiff an opportunity of producing certificate.*

When a subordinate Court dealing with a suit of a small cause nature commits an error of procedure patent on the face of the record, the High Court will interfere in revision.

Where an objection is taken for the first time in appeal that the suit on a promissory note should not have been decreed inasmuch as the plaintiff had not produced the succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate.

Where an assignment is from an undivided son, no succession certificate is necessary, nor when the plaintiff sues on the ground that he is a holder in due course and not that a debt did really exist. **M.** AMMASI KUTTI GOUNDEN *v.* APPATLU **234**

——— s. 115—*Revision—Interlocutory order—Refusal to frame additional issue.*

Even if the High Court can deal in revision with an interlocutory order in a suit, the exercise of the power is in the discretion of the Court and the power should not be exercised unless it appears that substantial injury may be caused to the applicant if he is left to wait for the ultimate remedy in appeal from the decree.

Civil Procedure Code—(1908)—contd.

There is no precedent for interference in revision with an order declining to frame an additional issue in a suit. **L. B.** V. V. M. CHETTY FIRM *v.* ARUNACHALLUM CHETTY, 8 L. B. R. 77 **876**

——— **ss. 141, 151, O. IX,** *—Execution proceedings struck off through mistake of Court—Power to restore.*

Section 141 of the Civil Procedure Code does not apply to execution proceedings and they cannot be restored under Order IX of the Code.

Even apart from section 151 a Court has an inherent power to rectify a mistake which has been inadvertently made by it.

Where, therefore, an execution application was fixed for hearing on the 6th January and was by mistake called up on the 5th and dismissed in the absence of the parties and the Court on the judgment-creditor's application set aside its order of dismissal:

Held, that the Court had an inherent power to rectify its own mistake and to restore the application to its file. **S.** LALBUX *v.* CHOITHRAM KALIANDAS, 8 S. L. R. 37 **592**

——— ——— ——— ——— **s. 141,** *scope of—O. XXI, r. 90; O. IX, r. 9, applicability of Execution, application for—Sale, application for setting aside.*

Section 141 of the Civil Procedure Code, 1908, does not apply to applications for execution.

An application for setting aside a sale under section 47 and Order XXI, rule 90, Civil Procedure Code, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party.

Where on the dismissal for default of an application for setting aside an execution sale under section 47 and under Order XXI, rule 90, of the Civil Procedure Code, another application for setting aside that order under Order IX, rule 9, is made:

Held, that Order IX, rule 9, is applicable to cases of this kind. **C.** DILJAN MIHHA BIBI *v.* HEMANTA KUMAR ROY, 19 C. W. N. 758 **395**

——— ——— **s. 144** **380**

——— ——— ——— ——— **s. 145,** *scope of—Surety, when liable.*

Section 145 of the Code of Civil Procedure applies only where the surety has rendered himself personally liable for the decretal amount, and such liability can only be enforced against him to the extent to which he has become personally liable. **C.** BROJENDRA LAL DASS *v.* LAKSHMI NARAIN KHANNA, 19 C. W. N. 961 **149**

——— ——— ——— ——— **s. 148** **119**

——— ——— ——— ——— **s. 149,** *scope of—Court-fees, deficiency of, made up after several orders, effect of—Discretion—Appeal.*

A plaint was presented to a Civil Court on the 19th April. On the 29th April an order was made on the plaintiff to pay the deficit Court-fees within a week. This was followed by several other orders providing for payment on later dates. Ultimately there was an order on the 7th August under which the balance was to be paid within five days, but it was paid the next day, the 8th August:

Civil Procedure Code—(1908)—contd.

Held, that there was an order and also payment in conformity with that order within the meaning of section 149, Civil Procedure Code.

A discretion exercised properly under the section cannot be challenged in appeal. **C.** PRIYA NATH BACHHER *v.* MIANJAN SARDAR **571**

——— ——— ——— ——— **s. 151** **133, 592, 673**

——— ——— ——— ——— **s. 152** **589**

——— ——— ——— ——— **s. 152**—*Clerical error in judgment—Correction—Jurisdiction.*

A Munsif, by a clerical error, recorded in his final order an order dismissing the suit instead of decreeing it. The decree was prepared in accordance with the final order:

Held, that the Munsif had jurisdiction under section 152 of the Civil Procedure Code to subsequently correct the error. **A.** BHAGIRATH NONIYA *v.* SUKHDEO NONIYA **144**

——— ——— ——— ——— **s. 152**—*Error—Accidental slip—Jurisdiction—Refusal of Court to correct mistake—Revision.*

In a suit for sale on the basis of a mortgage one of the defendants pleaded that he was a prior mortgagee. An issue was struck to that effect and was decided in favour of the defendant. In the operative part of the judgment, however, no mention was made as to the priority of the defendant's claim, and accordingly there was no mention of it in the decree. After the time for appeal had expired, an application was made for amendment of the decree under section 152 of the Code of Civil Procedure. The Court refused to go into its merits, holding that section 152 did not apply:

Held, that this was a clear case of an error arising from an accidental slip or omission and as the Court below had refused to correct the error, the High Court could interfere in revision. **A.** SAHDEO GIR *v.* DEO DUTT MISIR, 13 A. L. J. 449; 37 A. 323 **50**

——— ——— ——— ——— **O. I, r. 1** **298**

——— ——— ——— ——— **O. I, r. 8** **248**

——— ——— ——— ——— **O. I, r. 10 (i)**—*Suit by mother as administratrix—Subsequent addition of sons as plaintiffs—Suit, whether barred—Limitation Act (IX of 1908), s. 12—Bona fide mistake, meaning of.*

Where by a *bona fide* mistake it is erroneously supposed that a plaintiff should be represented in a particular way and subsequently the plaintiff is permitted to rectify the mistake and appear personally, this does not amount to the addition of a new plaintiff within the meaning of section 22 of the Limitation Act.

In matters of this kind the substance is to be looked to rather than the form.

Where a mistate is not made deliberately and where it is honestly made, the mistake is *bona fide*.

Where, therefore, a suit upon a registered mortgage-bond was originally instituted within the period of limitation by a widow not for her own benefit, but as administratrix for the benefit of her sons, and subsequently the names of the sons were added as plaintiffs after the period of limitation:

Held, (1) that the change was one of form only and not of substance and that there was no introduction of new plaintiffs when the sons were brought on the record;

Civil Procedure Code—(1908)—contd.

(2) that, therefore, the suit was not barred. **C.** NISTARINI DASSYA *v.* SARAT CHANDRA 680

——— ——— ——— O. 2, r. 2 678, 731

——— ——— ——— O. 2, rr. 2, 4—Res judicata—*Suit for mesne profits of land—Subsequent suit for possession of the same land, if maintainable.*

Where the plaintiff on being dispossessed of land filed a suit for mesne profits only which was decreed in his favour and subsequently filed another suit for recovery of possession of the land:

Held, that the subsequent suit was barred by the former suit under the provisions of Order II, rule 2, of the Civil Procedure Code. **S.** HIROMAL *v.* FARIDKHAN, 9 S. L. R. 23 939

——— ——— ——— O. 2, r. 4 939

——— ——— ——— O. 5, r. 20—*Service of summons upon defendant—Affixing of summons to outer door of house, when sufficient—Inquiry as to suit by third party, whether notice to party inferred.*

Notice of suit cannot be fixed to a party to a suit by officious inquiries made by parties unconnected with it about its result. Service of the summons by affixture to the outer door of the house of the defendant is good only when the plaintiff, on being told that the defendant has gone to a different place, makes an attempt to serve him in that place by taking out fresh summons against him to that place also. **M.** KATTAMPUDI SUBBIAH CHETTY *v.* WALJI LALJI SAIT 26

——— ——— ——— O. 6, r. 17 132

——— ——— ——— O. 6, r. 17—*Amendment of plaint—Minor plaintiff—Guardian and ward—Suit not to be dismissed on mere technicality*

The Divisional Court on appeal dismissed a minor plaintiff's suit on the ground that the plaint disclosed no cause of action, but it appeared that the plaint was only technically not properly drawn up:

Held, that under the circumstances of the case the plaint should be allowed to be amended. **P.** SANGAT SINGH *v.* UTTAM SINGH, 109 P. L. R. 1915; 65 P. W. R. 1915 769

——— ——— ——— O. 9 592

——— ——— ——— O. 9, r. 8 902

——— ——— ——— O. 9, r. 8, O. 17, r. 2—*Adjourned hearing—Non-appearance of plaintiff—Court, power of—Procedure.*

Where neither the plaintiff nor his Pleader appears on a day to which the hearing of a suit has been adjourned, the Court must make an order under Order IX, rule 8, and it is not entitled to proceed to decide the suit on the merits. **A.** PHUL KOER *v.* HASHMAT ULLAH KHAN, 13 A. L. J. 679 553

——— ——— ——— O. 9, r. 9 395, 1004

——— ——— ——— O. 9, r. 13 975

——— ——— ——— O. 9, r. 13—*Bengal Tenancy Act (VIII of 1885), s. 153A, scope of—Admission—Limitation Act (IX of 1908), Sch. I, Art. 164—Limitation—Dismmissal of suits—Material irregularity.*

Section 153A of the Bengal Tenancy Act requires that no application to set aside an *ex parte* decree in a suit between a landlord and tenant as such shall be admitted, unless the applicant has, at or before the time when the application is admitted, deposited in the Court to which the application is

Civil Procedure Code—(1908)—contd.

presented, the amount, if any, which he admits to be due from him to the decree-holder.

The admission of rent contemplated by the Legislature is an admission that rent is due in respect of the holding for which the suit has been instituted.

A person is not bound to make any deposit where he does not admit that any money is due from him to the plaintiff in respect of the holding for which rent is claimed.

Article 164 of the first Schedule to the limitation Act provides that an application by a defendant for an order to set aside a decree passed *ex parte* may be made within thirty days from the date of the decree or, where summons was not duly served, when the applicant had knowledge of the decree.

Under section 3 of the Indian Limitation Act it is obligatory upon the Court to dismiss a time-barred application, although limitation is not set up as a defence.

A Court acts with material irregularity in the exercise of its jurisdiction in granting relief, without adjudication of the question of limitation, on an application which, on the face of it, is barred by limitation. **C.** TARA SANKAR GHOSE *v.* NASARUDDI, 19 C. W. N. 970 876

——— ——— ——— O. 9, r. 13—*Ex parte decree against some of the defendants—Appeal by others—High Court, power of, to entertain application to set aside* ex parte *decree—Jurisdiction.*

A High Court has jurisdiction to entertain an application by some of the defendants to set aside an *ex parte* decree passed by the original Court when a second appeal by the other defendants is pending before it. **M.** SADAYA KONAN *v.* ANNAMALLAI UDAYAN, 2 L. W. 529 458

——— ——— ——— O. 17, r. 2 553

——— ——— ——— O. 17, r. 3, *scope of—Party's default after time has been granted to him—Court responsible for effecting service.*

The stringent provisions of Order XVII, rule 3, cannot be invoked unless time has been granted to a party specifically for performing any of the acts mentioned therein and that party has committed a default in performance thereof.

Where a party has paid the process fee for summoning witnesses the Court and its officers are responsible for effecting service and an adjournment caused by the non-attendance of witnesses for want of service is an adjournment in the ordinary course and does not amount to time granted to one party within the meaning of rule 3, Order XVII, Civil Procedure Code.

When an adjournment had already been rendered necessary by the non-appearance of the witnesses the fact that it was, at the same time, utilized for another purpose does not convert it into time granted to the defendants within the purview of rule 3 of Order XVII. **P.** HARJAS RAI *v.* NARAIN SINGH, 51 P. R. 1915. 938

——— ——— ——— O. 20, r. 12, O. 22, rr. 2, 3, 4, 10, O. 34, rr. 2, 3, O. 43, r. 1 (1)—*Preliminary decree, suit if continued till final decree after passing of—Suit by execution on mortgage in favour of estate of deceased testator—Death of executors—Right of widows to be brought on record as legal representatives of deceased testator—*

Civil Procedure Code—(1908)—contd.

Application under Order XXII, r. 3—Order, whether appealable—Transfer of Property Act (IV of 1882), ss. 88, 89.

Under the Civil Procedure Code of 1908, after the passing of a preliminary decree, the suit is continued until the stage of final decree is reached.

A widow of a deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who instituted the suit. The term "devolution" in Order XXII, rule 10, means the devolution of the interest of the person who instituted the suit.

An application to be brought on record by such a widow could be made only under Order XXII, rule 3, and as orders on such applications are not made appealable under Order XLIII, rule 1, no appeal lies from an order rejecting such an application. **M.** LAKSHMI ACHI *v.* SUBBAR MA AIYAR, 2 L. W. 403; 28 M. L. J. 490; (19.5) M. W. N. 327; 17 M. L. T. 385 **142**

——— ——— ——— ——— **O. 20, r. 12** **464**

——— ——— ——— ——— **O. 21, r. 12** **479**

——— ——— ——— ——— **O. 21, r. 15** — *Execution of decree—Personal decree against Hindu woman with limited estate—Debt incurred for legal necessities—Suit based upon allegations of necessity—Decree-holder entitled to prove necessity in execution—Payment of Government demands, whether legal necessity—One of several decree-holders can apply for execution of the whole decree.*

Where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her.

In execution of a personal decree against a Hindu woman with a limited interest in the estate obtained upon a plaint expressly alleging the debt to have been incurred for legal necessities, the decree-holder, in order to make the estate liable, is entitled to adduce evidence to prove the necessities for which the debt was contracted.

Government revenue and other Government demands are claims of Government on the land and their payment must be made by the estate and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy these debts.

Any one of the several joint decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. **C.** GAJADHAR PARSHAD SAHU *v.* BINDUBASHINI PERSHAD 181

——— ——— ——— ——— **O 21, r. 16** **673**

——— ——— ——— ——— **O 21, r 37 (1)**—*Execution of decree—Arrest of judgment-debtor, when may be ordered.*

A decree-holder is not justified in applying for the arrest of the judgment-debtor in the first instance, without trying to obtain execution of the decree by other means available to him, *i. e.*, by the attachment and sale of his property other than land **P** BAHADUR KHAN *v.* VIROO MAL, 73 P. L. R. 1915; 94 P. W. R. 1915 **152**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **O. 21, r 52** **239**

——— ——— ——— ——— **O 21, r. 52** **622**

——— ——— ——— ——— **O. 21, r. 58** — *Mortgage-decree—Attachment of property—Claims, investigation of—Procedure.*

Proceedings by way of attachment are not applicable to mortgage-decrees, but if the decree-holder applies for and obtains an order for attachment and property is attached, claims and objection to the attachment can be brought under Order XXI, rule 58, of the Civil Procedure Code, and such claims and objections must be dealt with under that rule and the following rules prescribing the procedure for investigation of claims and objections. **L. B.** MG. MRA TUN *v.* U KAING **941**

——— ——— ——— ——— **O. 21, r. 63** **622**

——— ——— ——— ——— **O. 21, r. 63**—*Claim Proceedings—Suit to establish right—Jurisdiction of Small Cause Court—Presidency Small Cause Courts Act (XV of 1882), s. 19 (s).*

A suit to establish a right given to the unsuccessful party in claim proceedings under the Code of Civil Procedure involves in every case a prayer for the setting aside of a summery order of a Civil Court. Such a suit cannot be regarded as a suit for a mere declaration and is not excluded from the jurisdiction of a Small Cause Court under section 19 *(s)* of the Presidency Small Cause Courts Act. **M.** RAJAMMAL *v.* NARAYANASAMY NAICKER, (1915) M. W. N. 376; 28 M. L. J. 600 **508**

——— ——— ——— ——— **O. 21, r. 89**—Decretal amount may be deposited in Court **916**

——— ——— ——— ——— **O. 21, r. 90** **395**

——— ——— ——— ——— **O. 21, r. 90, O. 32, r. 3**—*Application to set aside sale on ground of fraud and collusion, maintainability of—Minor substituted as judgment-debtor—Guardian* ad litem *not appointed—Sale, effect of.*

On the death of a judgment-debtor an application for substitution of the name of the sole legatee of the judgement-debtor, a minor, and his father and others was made. No application was made under Order XXXII, rule 3, of Civil Procedure Code, for the appointment of a guardian *ad litem*. The father acted throughout and eventually the property was sold and purchased by the decree holder. The mother, acting as the guardian and next friend of the minor, applied to have the sale set aside under section 47 and Order XXI, rule 90, Civil Procedure Code, alleging fraud and collusion:

Held, that under the circumstances of the case the mother was entitled to make the application and that she should be appointed guardian *ad litem* of the minor:

Held, further, that the sale of the property without appointing such a guardian was in itself an irregularity which would vitiate the sale, if it caused injury to the minor. **C.** KESHAWE SURENDRA SAHI *v.* DEVENDRABALA DASI **211**

——— ——— ——— ——— **O. 21, r. 19,** order under, whether appealable—Irregularity and fraud in publishing or conducting a sale **308**

——— ——— ——— ——— **O. 21, r. 94** **975**

——— ——— ——— ——— **O. 22, rr. 2, 3, 4, 10** **142**

Civil Procedure Code-(1908)-contd.

——— O. 22, r 10 *Insolvency of defendants in a money suit—Official Receiver, whether necessary or proper party to such suit Provincial Insolvency Act (III of 907), s. 6, cl. (2) (b)—Suit instituted before pendency of insolvency proceedings—Decree, how far binding on Official Receiver.*

The plaintiff sued for recovery of money and after the institution of the suit, the defendants applied to be adjudicated insolvents and were so adjudicated under the Provincial Insolvency Act (III of 1907). The defendants contended that the Official Receiver ought to be made a party to the suit and in any event, the decree ought not to be made binding on the Official Receiver:

Held, (1) that the insolvency of defendants in a mere money suit did not effect the devolution of any interest upon the Official Receiver within the meaning of Order XXII, rule 10, of the Civil Procedure Code;

(2) that as no interference in pending proceedings was contemplated by section 16 of the Provincial Insolvency Act (III of 1907), it was not necessary nor even proper to join in a suit of that nature the Official Receiver, but at the same time the decree could not be executed against the estate of the insolvents, nor be binding on the Official Receiver. **S.** JETHALAL KALIANJI *v.* GANGARAM NAOOMAL, 8 S. L. R. 325 **20**

——— O. 23, r. 3 **311**

——— O. 23, r. 3—*Compromise—Stamped paper, whether necessary.*

Where the paties to a suit compromise, all that the Court is required to do under Order XXIII, rule 3, of Civil Procedure Code, is to ascertain that the suit has been adjusted by a lawful compromise, and to put the fact on record. It is not necessary that a *sulehnamah* on stamped paper should be filed. **U. P. B. R.** MAHADEO PRASAD *v.* BASDEO TIWARI **511**

——— O. 26, r. 9 **60**

——— O. 26, r. 14 - *Partition decree—Execution—Division by casting lots, legality of—Equitable rule.*

A casting of lots for the purpose of allotting shares to the parties in execution of partition decrees is not opposed to Order XXVI, rule 14. The most equitable way by which properties could be assigned to co-parceners is to draw lots after dividing the properties with reference to the number of sharers. **M.** ANANTA RAMAPPA *v.* SUBRAYYA, 2 L. W. 430 **245**

——— O. 32, r. 3 **211**

——— O. 32, r. 4 (3)—*Guardian* ad litem, *appointment of—Consent of proposed guardian, necessity of*—Ex parte *decree against minors, when liable to be set aside.*

Order XXXII, rule 4 (3), of the Code of Civil Procedure, makes it imperative that the consent of the proposed guardian should be obtained for his appointment; and the appointment of any person as guardian *ad litem* without his consent is not a legal appointment. An *ex parte* decree obtained against both the major and minor defendants without a guardian properly appointed to the minors is one that is liable to be set aside so far as minors are concerned and the fact that the proposed guardian subsequently made an application to set aside the *ex parte* decree against the minors will not validate the originally invalid appointment. **M.** SHROOF SAHIB *v.* RAGHUNATHA SIVAJI **579**

Civil Procedure Code-(1908)-contd.

——— O. 32, r. 6 (2), O. 39, r. 10—*Joint Hindu family, suit by minor—Managing member acting as next friend—Managing member, right of, to withdraw money—Security, deposit of—Court, duty of.*

A next friend of a minor plaintiff, even if he is the managing member of the joint Hindu family of which both are the members, is not entitled to draw money from Court on behalf of the minor plaintiff without furnishing security.

A Court cannot, under Order XXXII, rule 6 (2) of the Code of Civil Procedure, order payment of money to a person not appointed guardian *ad litem* by any competent authority without demanding security from him. **M.** KRISHNA AIYAR *v.* CHAKRAPANI **475**

——— O. 32, r. 15 **595**

——— O. 34, rr. 2, 3 **142**

——— O. 34, r. 5 **120**

——— O. 34, r 14 **62**

——— O. 38, r. 2 **714**

——— O. 38, r. 5 **622**

——— O. 38, r. 5—*Attachment before judgment—Dismissal of suit by first Court—Cessation of surety's liability—Decree by Appellate Court—Security -Appeal, second—Plea of want of registration of security, if allowed*

When a surety pledges property by bond in order to save the property of a defendant attached before judgment under Order XXXVIII of Civil Procedure Code, the liability of the surety or of the property pledged ceases as soon as the suit is dismissed by the first Court, and that liability is not revived by the Appellate Court decreeing subsequently the plaintiff's claim.

The plea of want of registration of surety bond cannot be entertained on second appeal when the point has not been raised in the two Courts below. **P.** SHANKER *v.* RAM KISHEN, 53 P. W. R. 1915; 147 P. L. R. 1915 **271**

——— O. 38, r. (5), O. 39, r (1)—*Mortgage of right to receive certain dues—Decree for sale—Order of attachment and injunction, whether competent.*

The appellant mortgaged to the respondent his right to receive *malikana* dues from a number of villages and a decree for sale was passed on the mortgage, but before the sale the decree-holder obtained an order restraining the judgment-debtor from receiving the *malikana* dues:

Held, that the Court had no power either to attach the *malikana* dues or to prevent the appellant from receiving them. **A.** MUHAMMAD INAM-UL-DIN KHAN *v.* NARAIN DAS, 13 A. L. J. 65 **601**

——— O. 38, r. 10 **622**

——— O 39, r. 1 **601**

——— O. 39, r. 10 **475**

——— O. 41, r. 10 **59**

——— O 41, r. 20, *scope of—Party to suit includes representative of such party—Power to add parties, to be exercised at hearing—Setting aside, application for—Abatement and substitution.*

The words "any person who was a party to the suit" in Order XLI, rule 20, of the Code of Civil Procedure will, on a reasonable construction of the same, include the representative of such a party.

Civil Procedure Code—(1908)—contd.

The power given to the Court to add parties is a power which is to be exercised at the hearing, for it is necessary that the Court should have before it all the circumstances of the case.

The mere fact that the representative of a deceased person happens to be a party already on the record in his own right, does not dispense with an application for setting aside an abatement and substitution. **C.** ROMESH CHANDRA DAS *v.* ANTHONY PENHEIRO **470**

——————— **O. 41, r. 22**—*Cross-objections, whether can be urged against co-respondents.*

A respondent in an appeal is not ordinarily entitled to urge cross-objections except against the appellant.

Where a plaintiff had sued two defendants who had no common ground of defence, and was successful against one only and on that defendant appealing, the plaintiff filed a cross-objection in which he claimed a decree against the other defendant:

Held, that the plaintiff was not entitled to file a cross-objection against the second defendant and to prove his case against him. **U. B.** NGA TIN *v.* NGA SAW, U. B. R. 1915, II, 58 **610**

——————— **O. 41, r. 33**—*Dismissal of suit as time-barred against one defendant – High Court, whether can dismiss it against other defendants who were not impleaded.*

Where a suit is dismissed against one of the defendants as time-barred, the High Court can dismiss it against those other defendants who did not appeal and were not impleaded in the lower Appellate Court. **M.** SUBBARAYALU NAIDU *v.* PAPAMMAL **579**

——————— **O. 43. r. 1 (l) 142**

——————— **O. 43, r. 1 (s)**—*Order providing for appointment of Receiver, whether appealable.*

An order merely directing that a proper person should be appointed a Receiver is not appealable under Order XLIII, rule 1 *s*) **B** NARBADASHANKAR MUGATRAM VYAS *v.* KEVALDAS RAGHUNATHDAS, 17 BOM. L. R. 5.0 **504**

——— —— ——— **O. 43, r. 1 (u)**—*Order of remand under Madras Estates Land Act (I of 1908), whether appealable.*

No appeal lies against an order of remand made in proceedings under the Madras Estates Land Act I of 19.8. **M.** GURUSWAMY NAIDU *v.* SUBBA NAIDU **265**

——— ——— ——— **O. 44**—*Appeal* in forma pauperis—*Limitation Act (IX of 1908), Sch. I, Art. 170—Limitation.*

An appeal was filed in the High Court long after 30 days had expired from the decision of the Court below. On the report of the office as to the deficiency of the Court-fees, the appellant expressed his inability to pay the Court-fee and asked the Court to take the appeal *in forma pauperis*:

Held, that the appeal having been filed beyond 30 days of the decision of the Court below could not be treated as an application for leave to appeal *in forma pauperis* and was barred by limitation. **A.** GATI *v.* RACHLA KUNWAR, 13 A. L. J. 635 **1003**

Civil Procedure Code—(1908)—concld.

——————— **O. 47, r. 1 717**

——————— **O. 47, r. 1**—*Review, sufficient ground for.*

An application for review was made on the sole ground that if the Court allowed the applicants another opportunity of producing evidence, they might persuade the Judge that the view taken by him on the previous occasion was erroneous:

Held, that this was not a sufficient ground for review under Order XLVII, rule 1, of the Civil Procedure Code. **A.** BINDA PRASAD *v.* RAGHUBIR SARAN 13 A. L. J. 673 **994**

——————— **Sch. II, para. 16**—*Award—Application to set aside award dismissed—Decree—Appeal maintainability of.*

There is no right of appeal against a decree passed upon an award of arbitrators after dismissal of an application to set it aside. **M.** YELLA HANUMAYYA *v.* MULLANGI CHINNA DODDAPPA **512**

——————— **Sch. II, para. 20 49**

Civil Service Regulations. arts. 458, 464, *interpretation of—Pension rules—Officer removed from Government service, whether entitled to pension under Article 458.*

Under Articles 458 and 464 of the Civil Service Regulations it is essential that an officer to be entitled to pension must be in the service on the date of his retirement. Therefore, an officer removed by Government from service before that date, can have no claim for any pension. **M.** KOTHANDARAMIAH *v.* SECRETARY OF STATE, 2 L. W. 431; (1915) M. W. N. 323 **252**

——————— **art. 464 252**

Claims relating to properties in hands of insolvent and his representatives—Jurisdiction of Court to decide on application **168**

Common Manager. *See* BENGAL TENANCY ACT, s. 100.

Companies—*Right to forfeit shares, when properly exercised and by whom—Liability as contributory.*

A right to forfeit shares must, in order to be effectually exercised, be pursued with the greatest exactness by the proper parties, *i. e.*, by the Directors properly appointed and by the requisite number of them and in the proper manner and for proper cause. The right must be exercised *bona fide* for the purpose for which it was conferred.

Where, therefore, the Board of Directors passed a resolution authorizing the Managing Director to settle the matter of the appellant's liability with him and to place the result of such settlement before the next meeting of the Board for consideration and the Managing Director thereupon wrote to the appellant informing him that his shares had been forfeited, but the matter was never laid before the Board which, under the Articles of Association, was the only body empowered to forfeit the shares:

Held, that the Managing Director's action wa altogether *ultra vires* and not binding upon th Company and that on the Company going ins liquidation the appellant was rightly placed on the lie of contributories and his name could not be removeto **P.** KANSHI RAM *v.* KISHOR CHAND, 37 P. R. 191d. 101 P. W. R. 1915 **567**

Companies Act (VI of 1882), s. 214 105

Companies Act (VII of 1913), s. 38—*Rectification of register—Application made late - Discretion.*

A person who claims to have been misled by fraud or false representation into taking shares in a Company should raise the objection without delay.

The power to take summary action under section 38 of the Companies Act, 19 3, is discretionary. **P.** JAGAN NATH *v.* GOPI CHAND, 110 P. L. R. 1915 **770**

——————**s. 284**—Limitation—Appeal filed with delay—Sufficient cause—Objection by respondent at hearing Companies Act (VI of 1882), s 169—Appeal—Notice to respondent—Limitation period, expiring during vacation—Extension of limitation period—Right of Official Liquidator to recover by summary process from creditor of Bank who realised his debt by suit before passing of winding-up order and after suspension of payment by Bank **265**

——————**s. 284,** *meaning of—Pending proceedings, if affected by new Act—Interpretation of Statute.*

A construction which leads to absurdity or inconvenience should be avoided, unless the express words of a Statute compel the Court to hold otherwise.

Construction is to be made of all the parts together, and not of one part only by itself.

The plain and rational meaning of section 284 of the Companies Act of 1913 is that the new Act operates upon proceedings arising out of the windings-up which commenced after its enforcement (*i. e.*, 1st April 1914) and that no part of the Act has application to the pending liquidations. **P.** DAULAT RAI *v.* WAZIR CHAND, 20 P. R. 1915 **272**

Compensation to share-holders—Director of company guilty of misfeasance **105**

——————————Improvements, *bona fide*, by donee **269**

——————————Improvements—*Thekadar*, whether a tenant—*Thekadar's* right to make improvements and claim compensation **478**

Complaint. *See* CRIMINAL PROCEDURE CODE, s. 4 (*h*).

Compromise—Agreement out of Court to compromise suit—Order of adjournment—Additional evidence, whether legally admissible—Transfer of interest in immoveable property—Registration **860**

——————————in execution Court—Evidence—Registration, if necessary—Compromise, whether admissible in evidence **418**

——————————Stamped paper, whether necessary **511**

——————————of suit—*Razinama*, if requires registration—Evidence, admissibility of *razinama* in **311**

Confession. *See* EVIDENCE ACT, s. 24.

——————————*Confession implicating co-accused retracted at trial—Independent corroboration essential.*

Confession—concld.

Where one of two co-accused makes a confession implicating the other co-accused as well, independent evidence should be forthcoming to corroborate the confession in regard to each accused implicated.

Where *N* and *R*, husband and wife, were accused of the murder of *N*'s brother and *R* made a confession before the Committing Magistrate implicating her husband as well, but subsequently retracted the confession:

Held, that as there was no real corroboration of the retracted confession against *N* and against *R* herself there was merely the retracted confession corroborated solely by evidence of her absence from her house during the night of the alleged murder, the accused were entitled to the benefit of the doubt and must be acquitted **P.** NUR MUHAMMAD *v.* EMPEROR 22 P. W. R. 1915 CR; 163 P. L. R. 1915; 16 Cr. L. J. 463 **101**

Confidential proceedings, legality of **682**

Consent, if inferred from attestation **749**

Consent decree, nature of, how far binding—Consent decree and compromise compared **156**

Consideration. *See* MORTGAGE; SALE.

——————————New contract—Fresh consideration—Rule of English Law, applicability of **449**

Consignee of goods, right of **207**

Conspiracy. *See* CRIMINAL PROCEDURE CODE, s. 225.

Construction—*Kayam patta*—Surrounding circumstances and conduct of parties **188**

——————————*Wajib-ul-arz* **425**

Construction of document, essentials for **802**

——————————*Sale or mortgage—Test—Suit to cancel re-conveyance—Limitation Act (IX of 1908), Sch. I, Art.* 113.

The question whether a transaction is a mortgage by way of conditional sale or a sale with a provision for re-purchase depends ultimately upon the intention of the parties to be gathered from the instrument and the surrounding circumstances.

Per *Kumaraswami Sastri, J.*—Two tests are generally applied in deciding whether a transaction which is on its face a sale, is only a mortgage, because of the condition to re-convey. One is whether there was a debt subsisting at the time to discharge which the document was executed and the other is whether the value of the land conveyed is so disproportionate to the amount mentioned in the document as the alleged consideration for the sale as to raise a reasonable presumption that the parties intended only a security.

The plaintiff's father and the 1st defendant's father who were brothers, divided their family property, and the 1st defendant's father sold his share, the property in dispute, to the plaintiff's father, the sale-deed containing a provision that if the purchase-money should be re-paid together with the value of any improvements effected, the land should be surrendered to the first defendant's father. On the death of the plaintiff's father his mother acted as his guardian and conveyed the land back to

Construction of document—concld.

the 1st defendant's father on his re-paying the purchase-money. The plaintiff sued for a declaration that his mother's release was not binding upon him and that he was entitled to get back the property on paying the original purchase-money:

Held, (1) (*Coutts-Trotter, J. dissenting*) that the document executed by the 1st defendant's father was a deed of sale and not a mortgage;

(2) that the right which the 1st defendant acquired under the option to re-purchase was in effect a right to demand specific performance of the contract to reconvey, and there being no refusal to perform in this case the question of limitation did not arise. **M.** KALAPPA KAMTHI *v.* KACHUR SAKHA RAMA RAO **898**

——— **of sanad** **365**

Contract by Buddhist monk. *See* BUDDHIST LAW.

——— of guarantee—Consideration—Actual release of claim necessary and not mere promise **422**

——— *of partnership—Breach of contract, suit for—Damages—Death of one partner subsequent to suit, effect of.*

Where a cause of action exists, the damages must be estimated with regard to the time when the cause of action came into existence.

Where the suit is for damages for breach of contract of partnership, the death of one partner subsequent to the suit does not affect the quantum of damages. **M.** PAKALA RAMA RAO *v.* APPANA KUMARASWAMI **471**

——— *of sale or lease followed by delivery of possession—Document not executed, effect of—Subsequent suit, maintainability of—Ejectment—Vendor, whether can eject purchaser.*

Where in pursuance of an agreement for a lease or sale the intended transferee has taken possession, though the requisite documents have not been executed, the position is the same as if the documents had been executed, provided that specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined.

Where, therefore, the plaintiff in a suit for ejectment was the admitted proprietor of the land in dispute and the defendants resisted his claim for ejectment on the ground that they had come into occupation by his leave and license under an agreement for sale on the payment of part of the consideration money:

Held, that the plaintiff was not entitled to eject the defendants nor was he entitled to a decree for the balance of the consideration in the suit, because he had not sued to recover the money. **C.** AKBAR FAKIR *v.* INTAIL SAYAL **707**

——— for sale of immoveable property, whether creates vested interest—Rule against perpetuities—Contract, whether enforceable against survivors of joint Hindu family **435**

———Sale—Convenant for title, meaning of—Compensation for breach of contract—Claim made after execution of conveyance **394**

Contract Act (IX of 1872), s. 2 (g) **751**

——— **s. 4** **12**

——— **s. 4**—*Acceptance subject to a condition subsequent—Auction-sale—Bidder* benamidar *—Fraud—Misrepresentation—Repudiation of contract—Specific performance—*Benamidar *can sue—Exchange of* patta *and* muchilika *does not give title.*

Where an auction-sale conducted through an agent has been confirmed in the name of the highest bidder subject to the approval of the principal, there is a contract of sale on the grant of the approval.

Where there is an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, there is a contract, if that condition subsequent is satisfied.

In the absence of any restriction in the conditions of sale that bids must be made in the bidder's own interest and not on behalf of anybody else, the mere fact that a person was acting on behalf of somebody else when he made a bid, would not make it fraudulent, nor would it amount to such misrepresentation or suppression of material facts as to entitle the other party to repudiate the contract.

In a suit for specific performance it cannot be successfully pleaded in defence that the man who has entered into the contract for specific performance is not the man who has the beneficial interest.

An exchange of *patta* and *muchilika* or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent, but the mere exchange of *patta* and *muchilika* does not give title. **M.** CHITIBOBU ADENNA *v.* GARIMALLA JAGGARRAYADU, 28 M. L. J. 617 **12**

——— **s. 16**—*Security, if ample, effect of—Undue influence, presumption of—Rate of interest, excessive, effect of—Personal loans.*

Under the amended section 16 of the Contract Act the question of a harsh and unconscionable bargain can only be considered in reference to undue influence.

Where there is ample security, an excessive rateof interest has been held to be anything over 10 per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans. **C.** ABDUL MAJID *v* KSHERODE CHANDRA PAL, 19 C. W. N. 809; 42 C. 690 **843**

——— **s. 19**—*Misrepresentation avoiding contract must be one of fact—Damages for breach of contract—Criterion for assessing damages.*

Where the question is whether a certain statement is a substantive part of a contract or a mere representation, it is essential that the statement should be descriptive of the contract, in order to make it a term of the contract.

Where one of the contracting parties says: "I am well-known to the National Bank in your city," it is not a statement of fact, but only his own opinion as to the state of his credit, though it may be false; such statement is not one of fact, and even if false, does not avoid the contract under section 19 of the Indian Contract Act (IX of 1872).

In assessing damages for breach of contract the price ruling on the date on which the contract was finally cancelled must be taken to be the criterion and not that prevailing on any previous date. **M.** HOPE PRUDHOMME & Co., *v.* M. EARNEST MAX **575**

——— **s. 23** **241**

Contract Act—contd.

——— ——— ss. 23, 65—*Contract to appoint any one to public office—Suit for recovery of money paid thereunder, whether maintainable—Contract void* ab initio.

Contracts which have for their object the influencing of appointments to public offices and the restricting of the discretion vested in public officers in the selection of persons are illegal and void.

A Court will not assist a party who has entered into a contract tainted by moral turpitude.

Where a contract is illegal because contrary to positive law or against public policy, an action cannot be maintained to enforce it directly or to recover the value of services rendered under it or money paid on it.

Section 65 of the Contract Act relates to the obligation of a person who has received an advantage under an agreement which is discovered to be void or under a contract which becomes void but not where the agreement is void *ab initio*. **C** LEDU, COACHMAN *v.* HIRA LAL BOSE, 21 C. L. J. 537; 19 C. W. N. 919 **625**

——— ——— s. 23—*Excisable articles, sale of —Liquor, license to sell—Transfer—Partnership, terms of—Legality—Findings of fact.*

A partnership for the sale of excisable articles is not illegal. **C.** JNANENDRA NATH *v.* CHANDI CHARAN SAHA **480**

——— ——— s. 23—*Marriage — Divorce—Custom—Payment to caste—Repugnant to Hindu Law.*

A custom by which the marriage tie can be dissolved by either husband or wife, against the wish of the divorced party, and for no reason but out of mere caprice, the sole condition attached being the payment of a sum of money fixed by the caste, is opposed to public policy within the meaning of section 23 of the Contract Act and is also repugnant to Hindu Law, and, therefore, cannot be judicially recognised. **B.** KESMAV HARJOVAN *v.* BAI GANDI, 17 BOM L. R. 584 **952**

——— ——— ss. 23, 30—*Money lent for gambling purposes—Finding to be specific and clear.*

Where in a suit upon a promissory note the defence is that it was executed in respect of money advanced for gambling purposes, to render the money irrecoverable under section 23 or 30, Contract Act, 1872, it is not enough for the Court to find generally that the debt was contracted for gambling purposes, but it must also find whether it was lent for future play or for past play and what portion of it was used for such a purpose. **M.** RAMALINGA REDDI *v.* MUTHU THEVAN **573**

——— ——— s. 30 **573**

——— ——— ss. 38, 52, 54, 83—*Principal debtor entitled to avoid but not avoiding contract —Surety, whether liable for breach—Notice of arrival of goods, if offer—Failure to take delivery—Damages.*

A surety cannot escape liability on the ground that the circumstances were such that the principal debtor was entitled to avoid the contract, when in fact the contract was not avoided.

Where a condition in a contract that notice should be given of the arrival of the goods by a particular ship is not an essential part of the contract, failure to give such notice or a mistake in the notice given, is not a breach of contract entitling one party to avoid it for that reason nor can that notice by itself be deemed to be an *offer* of performance within the meaning of section 38 of the Contract Act.

Where on the receipt of notice of arrival of goods, one party has to apply for delivery of goods but fails to do so, he commits the breach and is liable in damages. **M.** SOUTH INDIAN EXPORT CO., LTD. *v.* CONDIAH CHETTY **712**

——— ——— s. 43 **811**

——— ——— s. 44 **760**

——— ——— s. 44—*Joint judgment-debtors— Release of one, release of other—Amount paid by one* —Pro tanto *reduction of liability.*

The release of a joint judgment-debtor does not operate as release of the others. It confers on them no higher rights than they would have had prior to the judgment, but they can claim the benefit of the amount actually paid by the released judgment-debtor. **M.** MOOLCHAND *v.* ALWAR CHETTY, 17 M. L. T. 449 **303**

——— ——— s. 45—*Mortgage—Several mortgagees—Payment by mortgagor to one mortgagee, if valid.*

A payment of the mortgage-debt by the mortgagor to one of the several joint mortgagees is not a valid payment as against the other mortgagees. **C.** UMES CHANDRA BANERJEE *v.* DINABANDHU MAHANTI, 21 C. L. J. 570 **956**

——— ——— s. 45—*Payment to one of several heirs of a promisee, whether operates as a discharge.*

A payment made to one of the several heirs of a deceased promisee is not binding on other heirs. **M.** MUNIANDI SERVAI *v.* RAMA SAMI **586**

——— ——— s. 56—*Sub-contract -- Principal contract, cancellation of—Effect on sub-contract.*

Where a sub-contract postulates the existence of a principal contract for its operation and continuance, the cancellation of the latter terminates the former also. **M.** GOPALASAMI PILLAI *v.* CHIDAMBARAM CHETTY, 2 L. W. 411 **151**

——— ——— ss. 62, 63—*Specific Relief Act (I of 1877), s. 6 (e)—Contract with a variation of terms after its breach—Suit for specific performance of such contract, maintainability of—Consideration— Fresh consideration—Rule of English Law, applicability of.*

Where on a suit for the breach of a contract to sell lands, a subsequent contract to sell lands other than those at first agreed upon was executed for the original consideration:

Held, that section 6 (*e*) of the Specific Relief Act applied and the plaintiff was entitled only to specific performance of the contract with the subsequent variation.

The rule of English Law that a fresh consideration is necessary for a new contract after breach is not imported into Indian Law.

Sections 62 and 63 of the Indian Contract Act have entirely altered the English Law in this respect and the original contract subsists notwithstanding the variation. **M.** RAMIAH BAGAVATHAR *v.* SOMASI AMBALAM, (1915) M. W. N. 408; 29 M. L. J. 125 **449**

Contract Act—concld.

——— **s. 63** 449
——— **s. 65** 625, 751
——— **ss. 73, 75**—Contract, breach of —Plaintiff, liability of, to prove damages--Written contract—Inconsistent contract, if can be proved 950
——— **ss. 74, 107**—*Right of re-sale by vendor where property not passed to purchaser—Re-sale commission and brokerage when goods not re-sold—Agreement to pay, unreasonableness of*

The right of re-sale after the breach of contract to purchase may be allowed as a means of ascertaining damages subject to the rule of reasonable compensation contained in section 74 of the Contract Act and is not limited to cases where property has passed to the buyer.

Where the property in the goods re-sold has not passed to the buyer, a re-selling commission cannot be allowed.

Re-selling brokerage and commission for goods not actually re-sold cannot be allowed as they are unreasonable and not justified by section 74 of the Contract Act, being imaginary and fictitious. **S.** FORBES, FORBES, CAMPBELL AND CO. *v.* OFFICIAL RECEIVER, 9 S. L. R. 20 933
——— **s. 75** 950
——— **s. 107** 933
——— **s. 134** 760
——— **s. 171** 870
——— **s. 209** 679
——— **ss. 217, 221** 870

Contribution—Properties of two owners mortgaged to secure one debt—One owner and his property, release of, on payment of one-half of debt—Major portion of property released—Liability of other mortgagor and remaining portion of mortgaged property 113
———, recovery of—Survey charges 595
———, *suit for—Court, duty of, to determine liability of each defendant—Joint decree erroneous.*

In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous.

In such a suit what the Court ought to determine is whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned, he is entitled to recover what is due to him from all the debtors, but as between the debtors, each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff has paid for him. **A.** SHEO PRASAD *v.* LALA RAM 205
———, suit for. *See* PARTNERSHIP.

Co-sharers—*Joint land—Long exclusive possession of one co-sharer—Building, erection of—Presumption—Other co-sharer, right of, to demolish.*

Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. **A.** LAHASO KUNWAR *v.* MAHBIR, 13 A. L. J. 555; 37 A. 412 15

Costs to abide—*Costs to abide and follow the result, meaning of.*

The words "to abide and follow the result" convey the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await till decision is given in the case. They do not have the effect of fettering the discretion of the trying Court. **M.** GODAVARTHI PERIA *v.* GODAVARTHI LAKSHMIDEVAMMA, 28 M. L. J. 441; (1915) M. W. N. 330 203

Co-tenancy. *See* PARTITION.

Court, power of, to introduce new provisions in Transfer of Property Act 113
———, Subordinate Judge empowered to entertain appeals, whether Court 71

Court-fees. deficiency of, made up after several orders, effect of—Discretion—Appeal 571

Court Fees Act (VII of 1870), s. 7 (i), (ix)—*Foreclosure suit—Appeal for enhancement of mortgage-money—Court-fee to be* ad valorem.

The appellants sued to obtain foreclosure of a mortgage and joined as one of the defendants a co-mortgagee who, they alleged, had parted with his rights to their predecessors-in-title. The co-mortgagee also filed a suit and admitting appellants' right to the extent of a half share, made them defendants as they refused to be co-plaintiffs with him. The suits were tried jointly and two different decrees were passed. The appellants filed an appeal for enhancement of the mortgage money payable to them:

Held, that they must pay *ad valorem* Court-fees on the amount by which enhancement was sought. **N.** WASUDEO *v.* DAYARAM, 11 N. L. R. 83 609
——— **ss. 7 (iv) (f), 11**—*Suit for accounts and administration—Valuation in the discretion of plaintiff.*

The plaintiff gave in the plaint all the facts and circumstances regarding her want of knowledge of the various interests, their nature, and state of accounts of the estate of her deceased ancestor, which obliged her to bring her suit in the form she did, and, therefore, sued for accounts and administration of the said estate and claimed her share therein. The suit was valued at Rs. 130 for purposes of Court-fees and at Rs. 30,00,000 for purposes of jurisdiction:

Held, that the suit was for an account and was properly valued under section 7 clause *(iv) (f)* of the Court Fees Act. **B.** KHATIJA *v.* ADAM HUSENALLY VASI, 17 BOM. L. R. 574 949

Criminal misappropriation. *See* PENAL CODE, s. 409.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 199—*Complaint—Petition by husband simply for coercing wife, whether a complaint—Magistrate directing Police inquiry—Charge sheet preferred before another Magistrate—Jurisdiction.*

Where the accused No. 1 leaving her husband's house went to the house of accused No. 2 with her jewels and some property, and the husband went to the house of the Deputy Magistrate at about 9 P. M., where was also the first accused, and presented a complaint not with the object of getting the Magistrate to take action but simply to coerce his wife to give back the jewels:

Criminal Procedure Code—contd.

Held, that there was no complaint under section 199 of the Criminal Procedure Code such as could entitle the Magistrate to take cognizance of the case after the death of the husband.

Where a Magistrate having cognizance of a case refers it to the Police for inquiry and report, the Police have no power to prefer a charge sheet before another Magistrate and such other Magistrate has no urisdiction to take cognizance of the case.

It is not open to persons after the husband's death to revive proceedings which were dropped during his life-time. **M.** RUKMANI AMMAL, *In re*, 16 CR. L. J. 466 **98**

——— ——— ——— **S. 110**—*Charge to be communicated to accused—Reputation, nature of, evidence of—Order without reasonable grounds as to prevent accused from furnishing security, legality of—Sureties, qualifications of.*

An order under section 110 of the Criminal Procedure Code should not be made unless the charge which the accused has to meet is communicated to him.

When it is sought to prove the reputation of a person, the evidence which is required is the evidence of respectable persons who are acquainted with the person on his trial, who live in the same neighbourhood and are aware of his reputation, and these persons should ordinarily not be officials.

An order under section 114 framed without reasonable grounds or with the express intention of preventing the accused from furnishing security is *ultra vires.*

The sureties required in a case under section 110 of the Criminal Procedure Code are persons who are in a position to influence the accused and likely to be able to restrain him and who, if they fail to do so, can forfeit the amount mentioned in the bond.

It is not to be supposed that only holders of landed property can be in such a position. **U. B.** NGA HEIN *v.* EMPEROR, 8 BUR. L. T. 53; 16 Cr. L. J. 553 **825**

——— ——— ——— **ss. 110, 121, 514**—*Security for good behaviour—Subsequent conviction under s.* 325, *Penal Code—Forfeiture of bond of sureties.*

Where a man was placed on security under section 110, Criminal Procedure Code, not merely as being a receiver of stolen goods but also as being a dangerous man and the son of a notorious dacoit, and was subsequently convicted of a bad offence under section 325, Indian Penal Code:

Held, that there was nothing in law to prevent the forfeiture of the bond of sureties under the circumstances. **P.** EMPEROR *v.* SHER SINGH, 10 P. R. 1915 CR.; 16 CR. L. J. 549 **821**

——— ——— ——— **S. 121** **821**

——— ——— ——— **S. 122** — *Sureties — Report by Police as to fitness of sureties, admissibility of.*

A Magistrate called for a report from the Sub-Inspector of Police as well as from the Tahsildar as to the fitness of particular persons to act as sureties in a case: the Tahsildar reported in the affirmative and the Sub Inspector in the negative. The Magistrate accepting the report of the Police Sub-Inspector declined to accept the sureties:

Criminal Procedure Code—contd.

Held, that the report of the Police Officer was not admissible in evidence and that it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. **A.** ZORAWAR *v.* EMPEROR, 13 A L. J. 469; 16 CR. L. J. 445 **77**

——— ——— ——— **S. 122** — *Surety, evidence about fitness of, rejection of—Magistrate, duty of—Burden of proof.*

The power of rejection of sureties conferred on Magistrates by section 122 of the Criminal Procedure Code, 1898, should not be used merely to prevent a '*badmash*' from giving security.

Although it is the duty of the accused to produce the evidence of the fitness of the surety, that burden is ordinarily discharged by the evidence of the surety himself. If the Magistrate is not satisfied with the evidence of the surety, that alone is not sufficient ground for rejection. Section 122 of the Criminal Procedure Code recognizes only one ground for rejection of the surety and the reason given by the Magistrate must be a positive reason for believing the surety to be unfit. If he is not so satisfied, he must make further inquiry and come to a definite conclusion one way or the other. **S.** MUHAMMAD IBRAHIM *v.* EMPEROR, 8 S. L. R. 322; 16 CR L. J. 479 **111**

——— ——— ——— **ss. 125, 406,** *scope of—Order to execute bond for keeping peace—District Magistrate's power to cancel bond.*

The terms of section 125 of the Criminal Procedure Code are sufficiently wide to cover a case where the District Magistrate finds that the materials before the Subordinate Magistrate were not sufficient to justify an order for taking security.

Section 406 of the Code gives an appeal to the District Magistrate from an order to furnish security for good behaviour, while section 125 relates to orders for keeping the peace as well as to those from which section 406 allows an appeal. **N.** EMPEROR *v.* DALLI, 11 N. L. R. 98; 16 CR. L. J. 555 **827**

——— ——— ——— **S. 145**—*Criminal revision—Oudh Judicial Commissioner's Court, powers of—Magistrate's order under section* 145, *Criminal Procedure Code, power to set aside.*

The Oudh Judicial Commissioner's Court, having no authority to revise proceedings except that given to it by the Criminal Procedure Code, has no authority to set aside an order passed by a Magistrate under section 145 of the Criminal Procedure Code. **O** IBAD-ULLAH KHAN *v.* RAHATULLAH KHAN, 18 O. C 69; 16 CR. L. J. 541 **669**

——— ——— ——— **S. 145**—*Dispute as to land between two channels—Boundary—Province of Agra and Oudh—Deep stream of* Ghagra—*Magistrate—Jurisdiction.*

The deep stream of the river Ghagra, as it exists at any given point, forms the boundary line between the District of Fyzabad in the Province of Oudh and the District of Basti in the Province of Agra.

A dispute arose about a piece of land situated between the two distinct channels of the river Ghagra between the District of Fyzabad and the District of Basti and the channel which was towards the Fyzabad side was found to be the deep stream of the river:

Criminal Procedure Code—contd.

Held, that the Magistrate of Basti had jurisdiction to take cognizance of the dispute under section 145 of the Criminal Procedure Code. **A.** AUDHENDRA PARTAP SINGH SAHAI *v.* DAMAN SINGH, 16 CR L. J. 527 **543**

——— ss. 145, 146—*Order "not to obstruct" without taking evidence, if final—Procedure.*

In a proceeding under section 145, Criminal Procedure Code, the preliminary order was made, the statements of the parties as required by clause (4) of the section were put in, but the Magistrate without examining the parties or taking any evidence ordered a party "not to obstruct":

Held, that the order was not a final order under the section and that if there was still a danger of a breach of the peace, the Magistrate must complete the proceedings as required by section 145 and make a proper order either under that section or under section 146. **B.** *In re* DYAWAPPA BASGUNDA PATIL, 17 BOM. L. R. 382; 16 CR. L. J, 434 **66**

——— s. 145, *scope of—Actual physical possession, consideration of—Possession, nature of, irrelevant—Written statement—Jurisdiction.*

Section 145 of the Code of Criminal Procedure is concerned solely with the fact of actual physical possession whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others.

Therefore, in proceedings under that section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant.

Questions as to the rights of parties raised by their written statements under section 145, Criminal Procedure Code, are quite irrelevant; as such proceedings are initiated by the Magistrate in the interests of public order and tranquillity and it is his preliminary order that settles the actual issue between the parties and founds his jurisdiction. **M** NARAYANA ASARI *v.* KANDASAMI ASARI, 16 CR. L. J. 525 **541**

——— s. 146 **66**

——— s. 146—*Attachment of property—Duration of attachment-- Adjudicatian of rights of parties by competent Court—Magistrate, duty of, to withdraw attachment.*

An order of attachment of property under section 146 of the Criminal Procedure Code remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto or of the person entitled to possession. **M.** MAHARAJA OF VENKATAGIRI *v.* AMBARKANA SRINIVASA ROW, 17 M. L. T. 392; 16 CR. L. J. 481 **321**

——— ss. 157, 165—*Locking of doors of accused's house by Police of one Police station in jurisdiction of another Police station, whether* ultra vires

Although the wording of section 165, Criminal Procedure Code, limits the powers of a Police officer to the places within the limits of the station of which he is in charge or to which he is attached and although the locking of the doors of an accused's house is a step which would facilitate the search of the house and would make the search a thing of some value, yet the locking of the doors and the keeping of guard over the house are also a part of the ordinary duties of the Police under the words in section 157 "to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender;" and in section 157 there is no provision preventing the Police of one Police station from acting under that section in the jurisdiction of another Police station. **P.** NATHA SINGH *v.* EMPEROR, 12 P. R. 1915 CR.; 16 CR. L. J. 551 **823**

——— s. 165 **823**

——— ss. 179, 181—*Charge of criminal breach of trust—Jurisdiction—Special and general provisions—Interpretation.*

According to the ordinary canons of construction a special provision should ordinarily receive effect unqualified by the general.

Section 179 of the Criminal Procedure Code can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done.

It is the Court within whose jurisdiction the primary loss takes place that can take cognizance of the offence of criminal breach of trust.

Where, therefore, the accused was appointed agent for the sale of the complainant's oil at Nandyal and used to send periodical reports to his principal at Madras showing the quantity of oil sold and the amount of money received, but after a certain time failed to do so and left his place of business and made away with the money:

Held, that inasmuch as the misappropriation was only of the money received and the loss primarily ensued to the complainant as a consequence of the accused's conduct at Nandyal, the Court of the Presidency Magistrate at Madras had no jurisdiction, to try the case. **M.** KRISHNAMACHARI *v.* SHAW, WALLACE & Co., 18 M. L. T. 25; (1915) M. W. N. 419; 29 M. L. J. 178; 16 CR. L. J. 491 **331**

——— s. 179—*Penal Code (Act XLV of 1860), s. 415—Cheating—Deceit—Jurisdiction—Court within whose jurisdiction complainant deceived.*

The accused, a trader of Salem in the Madras Presidency, deceived a trader in Dhulia in Bombay Presidency by leading him to believe that he was buying clean ground-nut oil when, in reality, he was buying a mixture of ground-nut oil with rock oil. The Dhulia trader was induced by the deceit to pay the price agreed upon on the understanding that it was clean oil:

Held, that the complainant was deceived in Dhulia and the Courts at Dhulia had jurisdiction to hear the case. **B.** JAMNADAS VASANJI *v.* EMPEROR, 17 BOM. L. R. 389; 16 CR. L. J. 433 **65**

——— s. 181 **331**

——— ss. 195, 467, 471—*Execution proceeding—Sanction to prosecute for offences—Appeal to District Judge—Jurisdiction.*

An application was made to a Judge of the Court of Small Causes for sanction to prosecute the applicant in respect of offences under sections 195,

Criminal Procedure Code—contd.

467 and 471 of the Penal Code, committed in an execution proceeding before him. The application was rejected. The matter was taken up to the District Judge under section 195, clause 6, of the Criminal Procedure Code. In that Court the application was registered as a criminal appeal:

Held, that the application should not have been registered as a criminal appeal as it was a matter in which the Sessions Judge had no jurisdiction. **A.** MOHAMMAD YASIN *v.* CHEDA LAL, 13 A. L. J. 709; 16 CR L. J. 524 **540**

——— ——— ——— ——— s. 195, cls. (6), (7) *—Subordinate Judge empowered to entertain appeals, whether Court—Jurisdiction—Sanction, revocation of —Penal Code (Act XLV of 1860), s. 209—Claim, meaning of—Madras Civil Courts Act (III of 1873), s. 8.*

Where, by a notification issued under the Madras Civil Courts Act (III of 1873), Government empowers all Subordinate Judges in the Madras Presidency situated in a place different from that of the District Court, to receive appeals direct and not by transfer from the District Court, such Subordinate Judges are Courts to which appeals "ordinarily lie" from the subordinate Courts within the meaning of section 195 (7) of the Code of Criminal Procedure, and such Subordinate Judges have jurisdiction to revoke on appeal the sanction to prosecute for an offence under section 209, Penal Code, granted by a subordinate Court.

The word "claim" used in section 209, Indian Penal Code, cannot refer to a document produced in evidence to substantiate the relief asked for in a suit. **M.** BODDU RAMAYYA *v.* CHITTURI SURAYYA, 28 M. L. J. 486; 17 M. L. T. 446; 6 CR L. J. 439 **71**

——— ——— ——— s. 195 (6) *– Sanction to prosecute—Superior Court—Jurisdiction to re-consider whole case.*

A Court of superior jurisdiction whose jurisdiction is invoked under section 195 (6) of the Code of Criminal Procedure should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below, it should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts. **A.** RAM RAJA DAT *v.* SHEO DAYAL, 13 A. L. J. 685; 16 CR. L. J. 489 **329**

——— — — ——— — s. 199 98

— — ——— — — — ss. 225, 537, 239, 256, 257, 342– *Charge, defective, effect of— Accused, right of, to know charge against him—Explosive Substances Act (VI of 1908), s. 4 (b), charge under, essentials of—Charge drawn up—Court, duty of, to adhere to statutory language—Misjoinder of charges—Trial, if illegal—"Same transaction," meaning of—Penal Code (Act XLV of 1860), ss. 120A, 120B—Criminal conspiracy, person when guilty of— Indictment, nature of, in conspiracy cases—Verdict, objection taken after, effect of—Co-conspirators, separate trial of—Court, power of—Offence under s. 4 (b), Explosive Substances Act—Prosecution, right of, to prosecute for the offence irrespective of ultimate design of conspiracy—Crime, sufficient proof of— Charge of conspiracy—General evidence, particular facts to be proved after—"Unlawfully and maliciously," meaning of—Explosive substances under s 4 (b), nature of—Prosecution, duty of—Offence, proof of— Accused, whether bound to show his object or design —Possession of explosive substances—Knowledge and assent, if necessary - Failure of conviction for crime committed - Prosecution for conspiracy, if expedient— Guilt, how established—Evidence Act (I of 1872), ss. 10, 143, 154 - Evidence under s 10, when admissible - Cross-examination—Defence, right of, to ask leading questions—Discretion under s. 154—Witnesses, privileges of, in criminal cases—Detective, whether privileged to refuse to answer as to where he was secreted—Statutory provisions, strict compliance with —Written statement in criminal cases, value of.*

Where it is alleged on behalf of the accused that the charge under section 4 (*b*) of Act VI of 1908 is materially defective inasmuch as it omits to state, *first*, that the accused were in possession of explosive substances or had them under their control "unlawfully and maliciously," and *secondly*, that it was the intent of the accused to endanger life in British India:

Held, that these defects in the charge do not vitiate the trial and conviction, and that the case would be covered by section 225 and by clause (*a*) of section 537 of the Code of Criminal Procedure.

An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him, otherwise he may be seriously prejudiced in his defence.

It is not essential to specify in the charge the explosive substances which the accused have conspired to have in their possession or under their control, where the illegal act, charged under section 120B, Indian Penal Code, is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act, 1908.

Even though the illegal act which he has agreed to do or caused to be done, has not been done, a person may be guilty of criminal conspiracy.

Although an indictment, which omits to set out the particular false pretence alleged, is held bad where an objection is taken before verdict, the defect is deemed cured by verdict if no such objection is taken and there is a verdict of guilty on such an indictment.

The indictment in all cases of conspiracy must, in the first place, charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed.

When a charge is drawn up, the Court should adhere to the language of the Statute as far as practicable

Sections 120A and 120B did not find a place in the Indian Penal Code before the 27th March 1913, when Act VIII of 1913 became law; and, therefore, persons accused under section 120B cannot be convicted, unless the prosecution establishes that the accused were members of a conspiracy after the 27th March 1913.

Where it is established that there has been a misjoinder of charges, the trial must be deemed illegal, because held contrary to an express provision of the law relating to the mode of trial.

Criminal Procedure Code—contd.

A comprehensive formula of universal application cannot be framed to determine whether two or more acts constitute the same transaction: but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are, proximity of time, unity or proximity of place, continuity of action and community of purpose or design.

If *A*, *B* and *C* conspire to make or have in possession or under control an explosive substance within the meaning of the Explosive Substances Act, and if in pursuance of such conspiracy, *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under section 120B, Indian Penal Code, and section 4 (*b*) of Act VI of 1908.

The Court has the option to place the co-conspirators on their trial separately.

Whenever evidence is attempted to be made admissible under section 10 of the Indian Evidence Act, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together.

Where an offence is committed under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute the accused for such offences, irrespective of the question of the ultimate design of the alleged conspiracy.

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

If the commission of a crime is directly in issue in any proceeding, it must be proved beyond reasonable doubt.

Where there is a charge of conspiracy, particular facts are proved to show that one or more of the defendants took part in it after general evidence of the existence of the conspiracy is first given.

Evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto.

To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question, and not of a different character and the acts tendered must also have been proximate in point of time to that in question.

The term "unlawfully and maliciously," in the sense in which it is familiarly used in the criminal law of England, signifies "not for a lawful object and intentionally, without justification or excuse or claim of right."

The explosive substance mentioned in section 4 (*b*) of Act VI of 1908 need not be such as to enable a person by means thereof alone, without the aid of other substances, to cause danger to life or injury to property.

Any part of any apparatus, machine or implement intended to be used or adapted for causing or aiding in causing any explosive substance, is included in the term 'explosive substance' as used in section 4 (*b*).

To place all the available evidence in the case

Criminal Procedure Code—contd.

fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined, and not to secure a conviction, is the main duty of the prosecution.

The offence charged against the accused must be proved by those who made the charge, and the accused stands only to hear the evidence that is given against him and, therefore, he is not bound to show at all, or in any way whatever, what his real object or design in doing any act or acts undoubtedly done by him was.

In a charge under section 4 (*b*) of the Explosive Substances Act, 1908, possession to be punishable must also be possession with knowledge and assent.

When the prosecution fails, on the evidence, to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime.

It is not by proof of his character but by proof of the facts that a man's guilt is to be established.

In the course of cross-examination by the defence for the purpose of eliciting facts in their favour from the prosecution witnesses, though those facts are irrelevant, the defence are entitled, in view of the generality of the provisions of section 143 of the Indian Evidence Act, to ask leading questions.

The Court may in its discretion, under section 154, Indian Evidence Act, permit the prosecution to cross-examine a witness, even though he had been originally called by them with regard to the matters elicited by the defence.

In criminal prosecutions, the witnesses for the Crown are privileged from disclosing the channel through which they have received or communicated information.

But the same privilege cannot be claimed by a detective, who cannot refuse on grounds of public policy to answer a question as to where he was secreted.

In a case where every possible point is likely to be contested, a strict compliance with the statutory provisions is desirable.

When a written statement is accepted by a Court from the accused, it does not take the place of evidence nor of such examination of the accused as is contemplated by the Code of Criminal Procedure.

C. AMRITALAL HAZRA *v.* EMPEROR, 13 C. L. J. 331; 19 C. W. N. 676; 16 CR. L J. 497 **513**

——————— **s. 239** **513**

——————— **ss. 254, 255, 256, 257**—*Trial in warrant case—Provisions of Code binding nature of—Magistrate, whether can vary procedure according to usage—Cross-complaints—Prosecution evidence in one cannot be treated as defence evidence in other.*

A Magistrate is not at liberty to substitute for the procedure of the Code a procedure which has arisen by usage, however convenient the latter may be. The provisions of the Code must be followed.

Where, therefore, in trying two cross-complaints, the Magistrate heard the evidence for the prosecution in each and without framing a charge formally as required by section 254 of the Criminal Procedure Code and without following the provisions of sections 255,

Criminal Procedure Code—contd.

256 and 257 in the first case, he dealt with it as if a charge had been framed and treated the evidence in the other case as defence evidence in the first:

Held, (1) that a trial conducted in a mode so materially different from that prescribed by law was not a proper trial;

(2) that the differences between the procedure followed and the legal procedure were of too fundamental and important a kind to be treated as irregularities curable by any of the sections in Chapter XLV of the Code. **B.** EMPEROR *v.* DOSABHAI J. DHONDY, 17 BOM. L. R. 490; 16 CR. L. J. 538 **666**

——— s. 256 **513**

——— s. 256—*Summons case tried together with warrant case—Procedure to be followed—Warrant case dismissed during trial—Summons case proceeded with—Right of accused to re-call and cross-examine prosecution witnesses—Right to re-call and cross-examine—Right refused—Prejudice—Burden of proof.*

Where a summons case is tried together with a warrant case, the procedure to be followed is that of a warrant case.

A summons case and a warrant case were tried together. During the trial the charge of the warrant case was dismissed and the charge of the summons case was proceeded with. The Magistrate refused to allow the accused to re-call and further examine the prosecution witnesses:

Held, that the refusal was illegal.

The privilege conferred by section 256, Criminal Procedure Code, is a substantive one and when denied, it is for the prosecution to show that the accused was not prejudiced by the denial. **M.** RALLABANDI SOBHANADRI, *In re*, 2 L. W. 574; 18 M. L. T. 92; (1915) M. W. N. 546; 16 Cr. L J. 540 **668**

——— s. 257 **513**

——— s. 307 (3) **72**

——— s. 339—*Approver—Pardon forfeited—Power of Sessions Judge to direct prosecution—Plea not taken before Committing Magistrate taken before Sessions Judge, legality of.*

In a case of dacoity one of the accused *G* was given a conditional pardon. The Sessions Judge, being of opinion that he had not spoken the truth, directed his prosecution under section 397 of the Penal Code. *G* pleaded pardon before the Sessions Judge, but not before the Magistrate:

Held, that the Sessions Judge had no authority to direct the prosecution of *G* on any specific charge and that if he came to the conclusion that the approver had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of his prosecution:

Held, further, that *G* was entitled to plead pardon before the Sessions Judge, although he had not done so before the Committing Magistrate. **A.** EMPEROR *v.* GANGUA, 13 A. L. J. 424; 37 A. 331; 16 CR. L. J. 483 **323**

——— s. 342 **79, 513**

Criminal Procedure Code—contd.

——— ss. 367, 424—*Judgment—Several accused—Appellate Court, duty of.*

Where there are several accused who have appealed, it must appear from the face of the judgment that the case against each of the accused has been taken into consideration and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each of the accused. **M.** CHERUKATH MAMMAD, *In re*, 16 CR. L. J. 496 **336**

——— ss. 374, 376 (b)—*Reference—Capital charge—Accused undefended—Re-trial, order of—High Court, power of.*

When an accused appears before a Judge on a Capital charge, he ought not to be allowed to go undefended, the custom being for the Judge to appoint or request any member of the Bar to conduct the defence of the accused.

Under section 376 (*b*), Criminal Procedure Code, the High Court has jurisdiction to order a new trial on the same or an amended charge. **C.** EMPEROR *v.* MOHAR ALI SHEIKH, 19 C. W. N. 556; 21 C. L. J. 495; 16 CR. L. J 481 **321**

——— ss. 330, 562—*Proceedings submitted to Sub-Divisional Magistrate—Jurisdiction—Power to acquit.*

A Magistrate to whom proceedings are submitted as provided by section 562 of the Criminal Procedure Code may pass such sentence or make such order as he might have passed or made if the case had originally been heard by him. He is not prevented from acquitting the accused, if on a perusal of the evidence he comes to the conclusion that conviction should not have taken place. **U. B.** MI TI HLA *v.* MI KIN, U. B. R. (1915) II, 55; 16 CR L. J. 535 **663**

——— s. 406 **827**

——— ss. 417, 435—*Acquittal in Sessions case tried with aid of Assessors—Revision petition to High Court against order of acquittal—Power of High Court to interfere in revision—Sessions Judge and assessors concurring—Important witnesses disbelieved—Sessions Judge, power of, to stop prosecution—Revision by private person.*

Ordinarily a High Court has jurisdiction to interfere on revision with an order of acquittal but it should exercise this jurisdiction sparingly and only where it is urgently demanded in the interests of justice.

The power of a Court to stop a case if it thinks it a waste of time to go on with it is undoubted and, therefore, where in a Sessions case two of the important witnesses for the prosecution were disbelieved by the Judge and the Assessors and the prosecution was stopped, there was no such patent miscarriage of justice as to call for interference by the High Court.

It is very doubtful if a private party should, as a matter of right, be allowed to move the High Court in such cases. **M.** NATESA PADAYACHI, *In re*, 17 M. L. T. 457; 28 M. L. J. 690; (1915) M. W. N. 411; 16 CR. L. J. 558 **830**

——— s. 421—*Reasonable opportunity to appellant to be heard in support of appeal—Advocate filing appeal not Advocate for appellant called upon to support appeal—Reasonable opportunity, if given.*

Criminal Procedure Code--contd.

Where the Advocate filing the petition of appeal is not himself the Advocate for the appellant, a reasonable opportunity for hearing the Advocate cannot be said to have been given where he is called upon forthwith to support the appeal. **U. B.** NGA SHWE HMUN *v.* EMPEROR, U. B. R. (1915), II, 52; 16 Cr. L. J. 538 **666**

——— **s. 423 (1)**—*Jurisdiction—Acquittal—Appeal—High Court, power of, to interfere—Grounds of interference.*

In appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. **M.** PUBLIC PROSECUTOR *v.* NARAYANA NAYUDU, 16 Cr. L. J. 529 **657**

——— **ss. 423 (1), 439 (3)**—*Reference—Power of Sessions Judge in appeal—Acquittal—Procedure — Enhancement of sentence, whether a fit ground for ordering re-trial.*

Where a Sessions Judge sitting in appeal is of opinion that an accused should be acquitted, he ought not to refer the case to the High Court. It is his duty to allow the appeal and acquit the accused.

Where a Sessions Judge sitting in appeal thinks that the case ought to have been tried by the Court of Sessions, he should himself set aside the conviction and order a commitment under section 423 (1) (*b*) of the Code.

The power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised. **A.** EMPEROR *v.* MOHAN LAL, 13 A. L. J. 477; 16 Cr. L. J. 433 **65**

——— ——— **s. 424** **336**

——— ——— **s. 435** **830**

——— ——— **s. 435** — *Charter Act, s. 15—High Court, power of, to quash proceedings at any stage—Penal Code (Act XLV of 1860), ss. 189, 504, offence under, essentials of—Abusing process-server, whether offence—Service of summons, when complete—Process-server, right of, to enter any house without permission.*

A High Court has jurisdiction to interfere at any stage of the proceedings if it considers that, in the interests of justice, it should do so.

Before an offence under section 189 of the Indian Penal Code can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function.

The mere fact that the accused abused the process-server will not constitute an offence under section 189 of the Indian Penal Code, nor will it constitute an offence under section 504 of the Indian Penal Code without an intention to cause a breach of the peace or knowledge that a breach of the peace is likely to result.

Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference.

The fact of a subpœna being entrusted to a process-server does not give him a general right of entry into any house without obtaining the permission of the owner or person in charge. **M.** KUPPUSAMI AIYAR, *In re*, 28 M. L. J. 505; 2 L. W. 463; 16 Cr. L. J. 477; 17 M. L. T. 398; (1915) M. W. N. 365 **109**

Criminal Procedure Code—contd.

——— ——— ——— **s. 439 (3)** **65**

——— ——— — ——— **ss. 467, 471** **540**

——— ——— ——— **s. 476**—*Time within which proceeding should be taken—Limitation.*

There is nothing in section 476 of the Criminal Procedure Code which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. **A.** TILAK PANDEY *v.* EMPEROR, 13 A. L. J. 466; 37 A. 344; 16 Cr. L. J. 465 **97**

——— ——— ——— **ss. 488, 489**—*Application by husband to cancel order of maintenance—Plea of divorce—Duty of Magistrate—Person of full age, whether can be presumed to act under influence of relations.*

Where a husband applies for the cancellation of an order of maintenance passed in favour of his wife on the ground that he has been divorced from her, it is the duty of the Magistrate to entertain such plea and give it consideration.

Muhammadan Law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *talak*.

A person who is of age cannot be presumed to be acting under the influence or compulsion of his relations with whom he is living in the absence of any evidence. **U. B.** HASAN CHANEA *v.* MI SIN, U. B. R. (1915), II, 53; 16 Cr. L. J. 531 **659**

——— ——— ——— **s. 489** **659**

——— ——— ——— **s. 514** **821**

——— ——— ——— **s. 517** **92**

——— ——— ——— **s. 523** **85**

——— ——— ——— **s. 526 cls. (1) (a), (8)**—*Transfer of case—Fair and impartial inquiry—Reasonable apprehension.*

Where an application was made by the accused to the trying Magistrate, before the commencement of the hearing, notifying his intention to move the High Court under section 526, Criminal Procedure Code, for transfer and praying for an adjournment for that purpose, but the application was rejected and some condemnatory remarks were made in a superfluous order by the Magistrate against the accused:

Held, that the Magistrate was bound to grant the adjournment and that as these irregularities coupled with the condemnation of the accused appeared to have created a reasonable apprehension in the mind of the accused that a fair and impartial inquiry could not be had, the case ought to be transferred. **S.** OTANDAS DWARKADAS *v.* EMPEROR, 8 S. L. R. 341; 16 Cr. L. J. 476 **108**

——— ——— ——— **s. 530**—*Bench of Magistrates—Conviction—Some not having heard evidence, effect of.*

A conviction by a Bench of Magistrates some of whom have not heard the evidence is vitiated and must be set aside. **M.** SUBRAMANIA AYYAR, *In re*, 38 M. 304; 16 Cr. L. J. 489 **329**

——— ——— ——— **s. 537** **513**

——— ——— ——— **s. 562** **663**

Criminal Procedure Code—concld.

——————— **s. 565**—*High Court, power of, to pass order under, in appeal or revision.*

Where a trying Magistrate, not especially empowered in this behalf, passed an order under section 565, Criminal Procedure Code, and directed a convict to notify his residence for a period of two years and the District Magistrate moved the High Court to pass such an order on revision:

Held, that the Magistrate's order being without jurisdiction must be quashed, but that as section 565, Criminal Procedure Code, required that the order should be made by the trying Magistrate at the time of passing the sentence, the Appellate Court or the Court of Revision could not make an order under that section where the original Court was not so empowered. **S.** EMPEROR *v.* DINO, 8 S. L. R. 340; 16 CR. L. J. 469 **101**

Criminal revision—Criminal Procedure Code (Act V of 1898), s. 145—Judicial Commissioner's Court, powers of—Magistrate's order under s. 145, Criminal Procedure Code, power to set aside **669**

Crown Grant—Ferry—Presumption **692**

Custom. *See* ALIENATION.

———— **Alienation**—*Necessity—Strict proof, when not required—Consideration, small portion of, not for necessity—Sale, if set aside.*

When a suit to set aside an alienation is filed a considerable time after the alienation was effected, strict proof of necessity cannot be expected from the vendee.

A sale is not to be set aside when only a small portion of the consideration for the sale is not found to be for necessity. **P.** KISHEN SINGH *v.* SOHNA, 117 P. L. R. 1915 **799**

——————— *of ancestral property—Necessity—Good faith—Second appeal—Question of law or fact.*

The question of valid necessity may be one of law, or of customary law or one of fact according to the peculiar circumstances of each case.

Where, therefore, in a suit by the minor sons for a declaration that the sale of ancestral property by their father shall not affect their reversionary right after his death, it appeared that the alienor was really in need of money for household necessities and that he took the money in good faith for ordinary purposes:

Held, that the question of valid necessity was one of fact in the case and its necessity being proved, the plaintiffs' suit must fail. **P.** RAJA *v.* ALLAH DITTA **802**

——————— **by widow**—Occupancy rights, creation of—Suit for declaration that creation of occupancy rights by widow was invalid—Limitation, starting point of **789**

———————*Ancestral land, whether liable to attachment in hands of widow of deceased proprietor*—Onus—*Effect of attachment.*

Where a male proprietor governed by Customary Law has contracted a debt, in respect of which a simple money-decree has been passed against him, and thereafter has died leaving ancestral landed property, which has come into the possession of his widow on the usual life-estate, such property

Custom—contd.

is liable to be attached at the instance of the deceased proprietor's judgment-creditor in execution of his money-decree.

The burden of proving that the deceased's estate in the hands of his widow is not liable for his just debts lies heavily on the person asserting this.

An attachment of property does not affect any title therein, but merely prohibits its transfer. **P.** BHAMBUL DEVI *v.* NARAIN SINGH, 39 P. R. 1915; 103 P. W. R. 1915 **572**

———————*Necessity—Payment of deb due by husband—Hindu Law—Payment of barred debt—Payment out of income of property.*

Under the Hindu Law a widow can validly alienate property to raise money for payment of debt due by her husband, even if she be able to pay it off out of the income of the property in her hands, but under the Customary Law she is not competent to do so.

Under Customary Law, unlike Hindu Law, a widow is not bound to pay debts due by her husband which have become barred by limitation. **P.** INDAR *v.* MOTI RAM, 112 P. L. R. 195; 75 P. W. R. 1915 **780**

———————Privacy—Windows interfering with privacy—Easement **154**

———————, reasonableness of—Question of law—Reasonableness, test for **312**

——————— **of math.** *See* MAHANT.

——————— **Sale**—*Consideration—Necessity for trifling amount not proved, effect of—Punjab Courts Act (IV of 1912), s. 41 (1) (a)—Second appeal, ground for interference in.*

In a suit to set aside a private sale the Courts should not interfere where the sale is an act of ordinary prudence or where the consideration is held to be necessary except to a comparatively trifling amount.

Therefore, where a lower Court overlooks these provisions, the Chief Court is entitled to interfere in second appeal. **P.** HAZARASINGH *v.* ARUR SINGH, 118 P. L. R. 1915 **801**

——————— **Succession**—Dakhna Aroras *of Multan—Sons—Eldest son entitled to extra share—Partition suit—Value of suit—Value of share of plaintiff.*

Among *Dakhna Aroras* of Multan there is a recognized custom as to giving of 1¼th share of ancestral immoveable property to the eldest son.

In a suit by a plaintiff for his share in joint family property the value of suit for purposes of jurisdiction is the value of the property claimed and not the value of the whole estate of which partition is prayed for. **P.** KHILANDA RAM *v* NANDA RAM, 108 P. L. R. 1915; 68 P. W. R. 1915 **769**

——————— *Hindu* Gorewaha Rajputs *of Garhshankar Tahsil, District Hoshiarpur—Daughter—Collaterals of fifth degree—Preferential heir—Ancestral property.*

Among agricultural tribes in the Punjab near collaterals do, as a general rule, exclude daughters from succession to ancestral property and it is for the daughter to prove her right to oust the collaterals.

Where on the death of *K*, a Hindu *Gorewaha Rajput* of the Garhshankar Tahsil, Hoshiarpur

Custom—concld.

District, his widow held the land and after her death mutation was effected in favour of the collaterals who took possession: On a suit for possession by the daughter of *K*

Held, that she had failed to prove that by custom among Hindu *Gorewaha Jats* of Garhshankar Tahsil, Hoshiarpur District, a daughter was entitled to succeed to the ancestral property of her father in preference to his collaterals in the fifth degree. **P.** RADHI *v.* PUNNU, 35 P. R. 1915 **561**

———**Succession**—Lodi Pathans *of Mustafabad, Ambala District—Presumption*—Onus.

In matters of inheritance *Lodi Pathans* of Ambala District follow agricultural custom and not their personal law, and the presumption is that among them first cousins succeed to ancestral estate in preference to daughters.

Where the daughters seek to rebut this presumption the *onus* lies on them to establish their prior right. **P.** ABDUL GHAFUR KHAN *v.* MUSHARRAF BI, 47 P. R. 1915; 89 P. W. R. 1915; 161 P. L. R. 1915 **7**

——— ——— ——— Pagwand *or* chundawand —Malkotra Rajputs, *Una Tahsil, Hoshiarpur District—Difference between the plains and hilly districts.*

Among the *Malkotra Rajputs* of the village Panjawar of Tahsil Una in the Hoshiarpur District, the rule of succession is *chundawand*, and not *pagwand.*

In the Punjab plains the custom of *chundawand* is slowly giving place to *pagwand* even where it may have been prevalent at one time, but there is no such certainty as regards the hilly tracts of the Province. **P.** GOPAL SINGH *v.* PRABH DIYAL SINGH, 50 P. R. 1915; 99 P. W. R. 1915 **650**

———**Will**—Gulfarosh Arains *of Lahore city —Will—Burden of proof, nature of.*

Among the *gulfarosh Arains* of Lahore city there is a custom of Will-making contrary to Muhammadan Law.

The burden of proving such a custom lies on the person who asserts it, but in view of the fact that the tribe is a mere fragment of a very large body of *Arains*, who are agriculturists and follow, except as regards certain things, ordinary Punjab custom, the burden is not a heavy one.

The fact that a party has repeatedly by act or word shown that he does not really follow a particular law, though it does not amount to an estoppel against him, still shows the views held by the party.

Instances in support of an alleged custom are not always to be treated as of little or no value because supported only by oral testimony; if the deponents have means of knowledge and the opposite party makes no attempt to rebut, facts stated may often be accepted as proved. **P.** RAHIM BAKHSH *v.* UMAR DIN, 49 P. R. 1915; 111 P. W. R. 1915 **382**

Damages—*One co-sharer's right to sue another co-sharer—Mutual arrangement about actual possession, effect of—Increased rent, demand for, for fishing.*

Where the plaintiff sues one of the co-sharers for damages for the wrongful removal of fish from a tank and it is found that there was an arrangement by which the defendant was put in possession of the tank with the right to take fish from it:

Held, that the arrangement or lease could not be void even under the Transfer of Property Act, because the act that was done in removing the fish was a past act and at that time, if under an arrangement, lease or license, whatever it may be called, the right was in existence, the defendant was justly exercising his right in fishing in the tank, and damages could not be claimed against him. **C.** BEHARI LAL NANDY *v.* KEDAR NATH NEBU, 19 C. W. N. 872 **806**

Damages—concld.

———— Principal debtor entitled to avoid but not avoiding contract - Surety, whether liable for breach—Notice of arrival of goods, if offer—Failure to take delivery **712**

———— Misrepresentation avoiding contract must be one of fact—Damages for breach of contract—Criterion for assessing damages **575**

———— — Sale—Mortgagee selling mortgaged land —Covenant to transfer another land if vendee dispossessed by redemption—Statutory prohibition of transfer of land - Vendee, right of **751**

—— Specific performance — One contract alleged and different contract proved **969**

——— Suit for recovery of balance of mortgage-money, whether maintainable in Small Cause Court—Damages for breach of contract **621**

——— ——, suit for—Malicious prosecution—Proof —Conviction of plaintiff in lower Court, effect of **883**

Declaration of title, *suit for—Nature of title to be ascertained first—Plaint, amendment of—Discretion exercised by lower Appellate Court—High Court, power of, to interfere.*

A Court ought not to declare the title of any party to a piece of land without knowing what the nature of that title is.

A High Court ought not to interfere with the discretion deliberately exercised by a lower Appellate Court in refusing to allow a plaintiff to amend his plaint during the progress of the suit, unless it is satisfied that the lower Court came to a wrong conclusion. **C.** HARI KRISHNA DAS *v.* DINOR KINLA **355**

Declaratory suit, maintainability of—Attachment before judgment—Decree-holder, if obtains priority **622**

Decree. *See* CIVIL PROCEDURE CODE, 1908 s. 2 (2).

——— ——— against head of family, how far binding upon other members **156**

——— ———, *ex parte*, against minors, when liable to be set aside **579**

——— ——— **nisi,** definition of **178**

Dedication *to religious or charitable purposes—Land once dedicated to one purpose, whether can be used for any other.*

If a piece of land is dedicated to one purpose, it cannot, contrary to the terms of the dedication, except in cases which fall under the *cy-près doctrine* (or its equivalent in Muhamadan Law) be utilised or any other purpose. **M.** GRAMANI ADAM SAHIB *v.* HAJI ABDULLA SAHIB **575**

Deed, *construction of*—Dastbardarinama—*Widow relinquishing her life-estate for consideration—Sale or relinquishment—Consideration not passed—Deed, validity of.*

Where a widow executed and registered a deed styling it a *dastbardarinama*, and stated in it that she renounced all her rights as widow in the estate of her husband held by her in favour of the next male reversioner in consideration of his agreeing to pay her a certain amount which amount was never paid:

Held, that the deed was not a sale-deed but a deed of release by which the widow surrendered her life-estate in her husband's land.

Held, further, that since no part of the consideration for the surrender of her life-estate was paid to her by the reversioner the agreement embodied in the deed was void and unenforceable. **P.** *Musammat* FAZLAN *v.* IMAM-UD-DIN, 95 P. W. R. 1915 **253**

Defamatory statement. *See* PENAL CODE, s. 500.

Deposit. *See* BENGAL TENANCY ACT, s. 174; TRANSFER OF PROPERTY ACT, s. 83.

—— in Court—*Money paid under compulsion of legal order, recovery of—Conditional payment—Judicial order, nature of—Rules of Supreme Court, O. XLV, rr.* 5, 6, *scope of—Inherent power of Court.*

The principle that, where money has been paid by the plaintiff to the defendant under compulsion of legal process which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received, cannot apply in a case where money was deposited by the plaintiff, *C*, on the faith of an order which stated explicitly that the money would be retained in Court pending the determination of the question whether the money belonged to *B*, the then judgment-debtor of *A*, or to *D*, the alleged creditor of the depositor *C*, but where without holding any inquiry and without notice to the depositor and his alleged creditor the Court paid it out to *A* on his application.

A deposit made by order of a Court pending adjudication of the question whether *B* or *D* is beneficially interested in the money, is a conditional one.

No judicial order can be made to the detriment of a person till he has been afforded ample opportunity to defend his rights.

The Rules of the Supreme Court in England contemplate not an *ex parte* order to the prejudice of third person who may be really interested in the debt due from the garnishee but an inquiry in the presence of all the persons interested.

The Code of Civil Procedure (Act V of 1908) does not contain any specific rule of the type of rules 5 and 6 of Order XLV of the Rules of the Supreme Court in England. But the Court has inherent powers to guard against an abuse of its process and to ensure that its orders do not operate to the prejudice of persons who have no notice of the proceedings.

The money deposited does not cease to be the money of the depositor merely because he brought it into Court on the faith of a conditional order, which directed its retention in Court pending inquiry into the question raised.

Deposit in Court—concld.

The Court has full authority to compel a party to bring back such money into Court to be re-paid to the other party entitled to it. **C.** HARINATH *v.* HARA DAS ACHARJA **580**

Detective, whether privileged to refuse to answer as to where he was secreted—Statutory provisions, strict compliance with **513**

Directors, whether agents or trustees **192**

Divorce decree by District Judge—Reference to High Court—Practice—Parties absent, effect of **178**

Divorce Act (IV of 1869), ss. 16, 17, 69—*Divorce decree by District Judge—Reference to High Court—Practice—Parties absent, effect of—Decree* nisi, *definition of—Prostitute, who is—Evidence Act (I of* 1872*), s.* 112*—Legitimacy.*

Per *Wallis, C. J. and Ayling, J.*, (*Sadasiva Aiyar, J.*, dissenting.)—The jurisdiction of the High Court to confirm the decree in a divorce suit arises immediately upon a reference. To complete that jurisdiction it is not necessary that there should be a personal appearance of the petitioner before the High Court.

Per *Sadasiva Aiyar, J.*—The order passed in a divorce case by a District Court is not a decree *nisi*. It is only a divorce decree passed by a High Court on its original side which is called a decree *nisi*. Under the Divorce Act the person who wants the confirmation of a decree pronounced by a District Judge ought to make an application to the High Court for confirmation and without such application the High Court should not confirm the decree passed by the District Judge.

The mere fact that a woman talks promiscuously with all, does not show her to be a prostitute, though she may be a coquette or a flirt.

The presumption of a child's legitimacy can be said to be rebutted, if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband before conception had not access to his wife. **M.** GUDA WILLIAM *v.* GUDA KARUNAMMA, 17 M. L. T. 357; 29 M. L. J. 269 **178**

—— —— **s. 69** **178**

Document, cancellation of—Limitation, from when begins to run **968**

—— —— ——, *construction of—Principle—Plain and unambiguous words—Court, duty of—Evidence Act (I of* 1872*), s.* 94*—Deed—Language plain and definite—Evidence, admissibility of, to prove language applies to other facts.*

Per *Spencer, J.*—When the language used is plain and applies accurately to existing facts, evidence is not admissible for the purpose of showing that it was not meant to apply to those facts.

Per *Coutts-Trotter, J.*—Where the words used in a document are definite and unambiguous, the Court must not travel outside the words used to found or confirm speculations as to the parties to the document having in fact intended other than what they have said. **M.** VELAPPA GOUNDEN *v.* PALANI GOUNDEN, (1915) M. W. N. 325 **201**

Dower. *See* MUHAMMADAN LAW.

S. N. DAR, B. A.-LL.
Vakil High Court,
SRINAGAR (Kash

Easement—*Custom—Privacy—Windows interfering with privacy—Injunction.*

A plaintiff is entitled to have a decree closing doors and windows opened by his neighbour, by obtaining an injunction from the Court on the ground that his privacy has been interfered with and by custom he is entitled to restrain the defendant from interfering with his privacy by opening new windows and ventilators. **P.** LAJJA RAM *v.* FAQIRA, 74 P. L. R. 1915 **154**

———— *Latrine erected on another man's land—Enjoyment for long series of years—Right of easement, if acquired—Right unknown to law—New easement, if created—Pleadings.*

Where the plaintiff along with some of the defendants erected latrines on land which did not belong to them, and used them for a long series of years and thereafter claimed a right of easement:

Held, that no question of easement arose in the case, for an easement of this description was unknown to law and the Court would not create a new species of easement.

Where, as in the present case, the act of the plaintiff was in the nature of trespass and it might perhaps have been open to him to contend that he had acquired a good title to the disputed property by adverse possession, but where no such claim was set forth at any stage of the litigation:

Held, that the plaintiff could not be permitted to make a case inconsistent with the title alleged in the plaint and that the relief sought could not be granted **C.** HERA LAL ROY *v.* LOKENATH SHAHA, 19 C. W. N. 864 **865**

———— *User for less than prescriptive period, whether possession—Right of suit—Incorporeal right, nature of—Adverse possession—Inclosure, proof of—Strongest evidence.*

Easements are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled.

Per *Sadasiva Aiyar, J.*—An incorporeal right which can be the subject of legal possession while in the process of acquisition should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct *animus* or intention of excluding other persons from like enjoyment with himself.

Inclosure is the strongest possible evidence of adverse possession. **M.** NARASAPPAYYA *v.* GANAPATHY RAO, 38 M. 280 **255**

———— *Water channel blocked—Power of Court to direct opening of another passage without demolition of construction.*

Where the defendant had blocked a water channel of the plaintiff by building a wall:

Held, that the Court had power to direct the opening of another channel through the defendant's land without demolishing the wall. **A** BISHUNATH SHUKUL *v.* GANESH DATT SHUKUL, 13 A. L. J. 637 **1002**

———— Water-course and way, obstruction to —Continuing nuisance **385**

Easements Act (V of 1882), s. 13, cl. 3 (d)—*Easement of necessity—Doors not necessary for light and air, if can be opened—Drains.*

Where the defendants were alleged to have practically closed by staking bricks three doors appertaining to a house and to have stopped the flow of water through a drain which had existed for a number of years, and it appeared that the keeping open of the doors was not necessary for the enjoyment of the premises, that the doors used practically to be closed always, that there was access to the house of the plaintiffs otherwise than through one of these doors and that sufficient light and air could be obtained without the opening of the doors:

Held, (1) that the plaintiffs' claim in respect of the doors was rightly dismissed;

(2) but that as there was no other drain in the house of the plaintiffs and for the flow of water from the kitchen of the house there was no other outlet, the plaintiffs were entitled to use the drain for the flow of water from the kitchen and the defendants could not obstruct it. **A.** BISHAMBHAR NATH *v.* JAGAN NATH PRASAD **695**

Ejectment. *See* AGRA TENANCY ACT, 1901, s. 197; CENTRAL PROVINCES TENANCY ACT, 1898, s. 88; LANDLORD AND TENANT.

———— Contract of sale—Document not executed—Vendor, whether can eject purchaser **707**

———— , defence against—Contract of sale and delivery of possession, if can be pleaded—Remedy **195**

———— Notice of ejectment—Proper rent not specified—Court-fee paid sufficient—Land from which ejectment sought, not specified—Notice, if defective **656**

———— Occupancy holding, mortgage of—Mortgagor, if can eject mortgagee without paying mortgage-money **490**

———— *Person occupying land—No rent paid—Occupancy rights, acquisition of—Agra Tenancy Act (II of 1901), s. 34.*

In a suit for ejectment it was found that the land in dispute was held without payment of rent for a period of 26 years, twelve years out of which had expired while the old Act was in force. The status of *muafidars* was expressly disclaimed:

Held, that as there was no contract of tenancy between the parties, the tenant did not acquire occupancy rights. **U. P. B. R.** BALAK *v.* COLLECTOR OF JAUNPORE **285**

———— Raiyat *at fixed rate of rent and occupancy* raiyat, *privileges of, distinguished*—"Kayemi", *meaning of*—"Sthayee karsha kabulyat," *meaning of—Under*-raiyat's *interest, whether heritable—Agricultural year, suit instituted before expiry of—Decree—Execution.*

A *raiyat* at a fixed rate of rent is competent to create a permanent heritable interest in favour of his grantee, although the latter is an under-*raiyat*.

The use of the term *'kayemi'* in a *kabulyat* imports not fixity of rent, but only permanence of occupation of the land.

Where the plaintiff is an occupancy *raiyat*, he is not competent to create in favour of his grantee a permanent heritable under-*raiyati* interest.

Ejectment—concld.

The description of a *kabulyat* as "*sthayee karsha kabulyat*" does not necessarily imply that the grantee was intended to have a permanent heritable interest.

Where the grantee is an under-*raiyat* of an occupancy *raiyat*, his interest is not heritable.

Where the suit was instituted before the expiry of the agricultural year current at the time when the original under-*raiyat* died:

Held, that the proper form of the decree would be one for ejectment against his representatives, the defendants, to be executed only on the expiry of that particular agricultural year. **C.** MEHER ALI *v.* KALAI KHALASHI, 19 C. W. N. 1129 401

——— —— User for agricultural purpose—True test—Occupancy right, acquisition of, by 12 years' possession, effect of 834

——— —— —— **suit**—*Cause of action, when arises—Suit withdrawn without permission to bring fresh suit—Fresh suit based on another cause of action, if barred—Civil Procedure Code (Act XIV of* 1882), *s.* 373.

A fresh cause of action arises each year as regards ejectment and, therefore, a suit for ejectment withdrawn without permission to bring a fresh suit does not bar another suit of ejectment based on another cause of action. **U. P. B. R.** GOPHURAN *v.* KALLU 24

——— —— ——— *by* lambardar—*Other co-sharers no parties—Co-sharers making separate collections*——Lambardar, *rights of, to eject* qua lambardar—*Oudh Rent Act* (*XXII of* 1886), *ss.* 108 (8), 126 (1).

A *lambardar*, though he does not make the entire collections of the village, is entitled to maintain a suit for the ejectment of a tenant, the consent or dissent of other co-sharers being immaterial. Section 126 (1) of the Oudh Rent Act is no bar to such a suit. A share-holder objecting to his action has his remedy to apply for his removal and to partition his share. **U. P. B. R.** GAJRAJ SINGH *v.* UDEY PARTAP NARAIN SINGH 297

——— —— ——*Parties—All co-sharers must join unless agent appointed*—Lambardar *as such, power of, to eject.*

All the co-sharer landlords must join in a suit for ejectment unless they appoint an agent for the same.

A *lambardar* as such has no power of ejectment. **U. P. B. R.** SAHAI *v.* ALI BAKSH 35

——— ——— ——— *Trespass — Tenant-in-common, right of one to sue alone—Civil Procedure Code* (*Act V of* 1908), *O. XXVI, r.* 9—*Personal inspection by Judge, finding based on—Judgment, if valid.*

As against a trespasser in possession of immoveable property any one of co-owners or co-tenants can alone maintain an action in ejectment.

A judgment solely based on knowledge gained by the Judge during local inspection is illegal. An inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. **M.** AHMAD SAHIB SHUTARI *v.* MAGNESITE SYNDICATE LTD., 2 L. W. 460; 17 M. L. T. 387; 28 M. L. J. 598 60

Election of Mahant—Practice. *See* MAHANT.

Enhanced rent, *recovery of, suit for—Tenure-holder, rent paid by, whether liable to enhancement—Construction of document, essentials for.*

Variableness of rent is the normal condition and even the naming of a sum is not conclusive against this; and, therefore, each case of enhancibility of rent is to be judged by its own peculiar circumstances.

Where there is no document, the conduct of the parties, especially where it extends over a long period of time, may justify an inference as to the terms on which land is held; but where there is a document defining the right of the parties, its terms must in the first instance be investigated.

In construing a document to ascertain its meaning, the Court must have regard to every fact a knowledge of which may conduce to the right application of the words used.

Where no sufficient ground is found for excluding the normal condition of variableness, the rent is enhancible. **C.** ANATH NATH MITRA *v.* MIDNAPUR ZEMINDARY CO. 802

Estoppel 807

——— ———. *See* EVIDENCE ACT, s. 115.

——— ———*Agreement not to eject tenant so long as rent was duly paid—Such agreement whether to be in writing.*

A *zemindar* agreed not to eject his tenant so long as he paid rent in consideration of the receipt of the large amount of arrears due from a previous tenant:

Held, that the *zemindar* was estopped from ejecting the tenant so long as he paid rent.

That there was no reason for holding that such an agreement should be in writing. **U. P. B. R.** YUSUFUZZAMAN *v.* BODHAN 656

——— Buddhist Law—Husband and wife—Wife's interest in joint property affected by mortgage executed by husband alone—Wife's conduct and acquiescence 881

——— —— ——Mortgage, if can be questioned against a *bona fide* purchaser for value without notice 841

——— ——— ———, principle of 734

——— ——— ——— Representation by minor as major, effect of 957

——— ——— *Tenancy admitted by landholder to be a fixed-rate tenancy—Tenant, whether can be ejected as occupancy tenant.*

In a suit for enhancement of rent against his tenant, the *zemindar* entered into a compromise in which he said that the nature of the tenant's tenancy would be that of a fixed-rate tenancy and proceeded to describe certain of its incidents. No mention was made of the grounds mentioned in clause (*d*) of section 57 Act II of 1901, probably because he had said that the land will be treated as a fixed-rate tenancy. The land-holder then brought the present suit for the ejectment of the tenant and his mortgagee on the ground that the tenant had transferred his holding which he alleged to be an occupancy tenure:

Held, that the *zemindar* was estopped from asserting that it was not a fixed-rate tenancy. **U. P. B. R.** BHAGWAN SINGH *v.* DWARKA RAI 677

——— ———Test 386

Evidence, admissibility of *razinama* in **311**

——, admission of, by Magistrate when writing judgment—Irregularity **90**

——, propriety of — Admission of further evidence **696**

——— *Compromise in execution Court—Registration, if necessary—Compromise, whether admissible in evidence.*

The joint holders of a decree entered into a compromise among themselves as to the manner in which the decree should be executed and their petition of compromise presented to the execution Court and acted upon:

Held, that the compromise did not require registration:

Held, further, that the compromise was admissible in evidence and binding upon the parties by reason of the order to that effect which was passed upon it by the Court executing the decree. **A.** BHARATH CHAUBE *v.* GAYA CHAUBE **418**

——— Final judgment—Review—Application for reception of new evidence—Sufficient reason not shown—Rejection of application, propriety of—Civil Procedure Code (Act V of 1908), s. 114, O. XLVII, r. 1 **717**

——— Lease—Documentary and oral evidence, admissibility of—Tenancy, proof of **502**

——— *Oral—Weight to be given to opinion of trial Judge—Duty of Court of Appeal—Cross-examination to credit—Relevancy—Credibility of witness.*

On appeal the whole case, including the facts, are within the jurisdiction of the Appellate Court: but generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit attached to one or the other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal.

Where the issue is simple and the only question is which set of witnesses is to be believed the verdict of the Judge trying the case should not be lightly disregarded.

Cross-examination to credit is necessarily irrelevant to any issue in an action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case where everything depends on the Judge's belief or disbelief in the witness's story.

Where the Judge who heard the evidence rejected the story of a witness declaring that he had seldom seen in the box a more "thoroughly unscrupulous, untrustworthy, untruthful man" than the witness, but the Court of Appeal accepted the witness's story saying that the cross-examination of the witness which convicted him of being a party to a false and fraudulent balance sheet, was "not a very relevant point," and that witness was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers;"

Evidence—concld.

Held, that the Court of Appeal ought not to have excused the witness and actually accepted his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts. **P. C** BOMBAY COTTON MANUFACTURING Co. *v.* MOTILAL, 19 C. W. N 617; 17 M. L. T. 408; 28 M. L. J. 593; 21 C. L. J. 528; 17 BOM. L. R. 455; 2 L. W. 521; 39 B. 386 **229**

——— Proof—Other articles in newspaper, admissibility of—Disaffection to be excited must be against Indian Government—Relevancy of disaffection excited against other authorities **827**

——— Report by Police as to fitness of sureties, admissibility of **77**

——— Waste land—Title—Possession — Quantum of evidence necessary—Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Open village sites, title of Government—Presumption **51**

——— Will not produced—Secondary evidence, admissibility of **807**

——— *Written statement—Admission by one defendant, when admissible against others.*

An admission of one defendant in a written statement in a suit will not be evidence against others unless it is made evidence at the trial by examining that defendant who made the statement. **M.** SESHAGIRI AIYANGAR *v.* SADACHI **924**

Evidence Act (I of 1872), ss. 10, 143, 154—Evidence under s. 10, when admissible—Cross-examination—Defence, right of, to ask leading questions—Discretion under s. 154 -Witnesses, privileges of, in criminal cases **513**

——— **ss. 24, 25, 26, 27**—*Confession—Information received from accused, how far relevant.*

Where the statement made by an accused to the Sub-Inspector of Police was to the effect that he would point out the spot where he had committed the murder, and thereafter he conducted the Police to a spot where earth was found saturated with blood:

Held, that so much of the Sub-Inspector's evidence as related to the alleged confession by the accused that he committed the murder was not admissible in evidence.

It was not the intention of the Legislature to allow the Police by an ingenious perversion of the provisions of section 27, Indian Evidence Act, to get rid of the safeguards thrown round prisoner by sections 24, 25 and 26 of the Act and the exception to the general rule must be very strictly confined within its legitimate limits. **P.** TARA SINGH *v.* EMPEROR, 11 P. R. 1915 CR.; 16 CR. L. J. 545 **817**

——— **ss. 25, 26, 27** **817**

——— **ss. 32, 91** — *Statement not against pecuniary or proprietary interest of person making it, whether admissible—Plaintiff relying upon document—Other evidence of transaction, if admissible.*

A statement by a plaintiff as a witness to the effect that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under section 32 of the Evidence Act.

Evidence Act—contd.

Where the plaintiff relies upon a mortgage-deed produced by her but not proved, she is precluded by section 91 of the Evidence Act from giving other evidence of the terms of the transaction. **U. B.** MI NGE MA *v.* NGA TALOK PYU, U. B. R. (1915), II, 56 **607**

——— **s. 32 (2)**—*Relevant fact—Ordinary course of business—Appellate Court, powers of—Settlement papers, admission of, after first Court's decision.*

There is nothing in section 32, clause 2, which requires any formal proof that certain papers were kept as a fact in the ordinary course of business.

Settlement papers cannot be admitted by the Appellate Court after the first Court's decision in the case. **C.** BAID NATH SAHAY *v.* NANKU MAHTON **219**

——— **s. 32 (7)** **974**

——— **s. 33** **639**

——— **ss. 33, 145, 157**—Previous statements, when and how to be used—Civil suit—Procedure—Documents to contradict witnesses—Witness to be given opportunity to explain **639**

——— **s. 35**—*Survey records, entry of measurement of survey fields in, admissibility of, to prove encroachment—Title, proof of.*

Entries of the extents of the survey fields made in survey registers are admissible under section 35 of the Evidence Act to prove an encroachment, though insufficient to prove title to the extent encroached upon. **M.** KALAYI NARAYANA JOGITHAYA *v.* SECRETARY OF STATE, 2 L. W. 413 **154**

——— **s. 58** **698**

——— **ss. 68, 72**—*Mortgage-bond not properly attested, if admissible in evidence—Simple money-bond.*

Where a mortgage-deed is not properly attested in accordance with the provisions of section 59 of the Transfer of Property Act, it is not admissible in evidence as a mortgage-deed but it is admissible in evidence as a simple money-bond. **A.** MATHRA PERSHAD *v.* CHEDDI LAL, 13 A. L. J. 553 **363**

——— **s. 72** **363**

——— **s. 90,** presumption in, whether applicable to copies **386**

——— **s. 91** **607**

——— **s. 92** **760, 892**

——— **s. 92**—*Agreement out of Court to compromise suit—Order of adjournment—Additional evidence, whether legally admissible—Transfer of interest in immoveable property—Registration.*

An order of Court adjourning a case and incidentally noting the fact of an agreement made out of Court between the parties as a ground of adjournment does not purport to be and is not a record of the terms of the compromise; and additional evidence to add to the terms of the compromise is not inadmissible under section 92 of the Evidence Act.

Where in a suit for possession of a house the parties arrived at an agreement that the defendant should deliver possession of the house on payment of

Evidence Act—contd.

Rs. 500 by the plaintiff and on the defendant failing to do so, the plaintiff sued on the basis of this agreement:

Held, that the suit was maintainable even though the agreement was not registered inasmuch as

(*i*) it did not contemplate any transfer of interest in immoveable property; and

(*ii*) the suit was one for possession and not for a declaration of title. **M.** SAMBANDA MUDALIAR *v.* CHINNASAWMI SAH **860**

——— **s. 92**—*Contract Act (IX of 1872), ss. 73, 75—Contract, breach of—Plaintiff, liability of, to prove damages—Written contract—Inconsistent contract, if can be proved.*

It is not open to a party to a written contract to prove a contract the terms of which are clearly inconsistent with the terms of the written contract.

Sections 73 and 75 of the Contract Act make it compulsory on the plaintiff to show that he has suffered and the extent to which he has suffered; before a Court can award him damages for a breach of contract. **A.** BANARSI DASS *v.* LULLA MAL **950**

——— **ss. 92, 94**—*Mistake in description of property sold—Evidence to prove what was actually sold, whether admissible—Rectification of sale-deed—Specific Relief Act (I of 1877), s 31.*

Under section 92, clause (*a*), of the Evidence Act, any fact may be proved which would entitle a person to a decree on the ground of mistake of fact or law, and there is nothing in the section giving such a right to a plaintiff alone.

Where there is a misdescription of the property sold, the vendee can claim a rectification of the sale-deed under section 31 (*a*) of the Specific Relief Act.

Such a right can be used as a shield when possession is sought to be wrested from the party entitled to the rectification, and the fact that he is a defendant does not disable him from setting up the plea which could have availed him as plaintiff.

The combined effect of section 92, clause (*a*), Evidence Act, 1872, and of section 31, Specific Relief Act, 1877, is that the defendant can resist a suit on the ground that what was sold to him was different from what the sale-deed contained. **M.** RANGASAWMI AIYANGAR *v.* SOWRI AIYANGAR, (1915) M. W. N. 448; 18 M. L. T. 75; 29 M. L. J. 229 **588**

——— **s. 92, proviso 2**—*Suit on promissory note—Written contract—Oral agreement—Burden of proof—Conditional admission in pleadings—Objection under the section taken for first time in Court of Appeal—Pleadings, amendment of.*

It is allowable under section 92 of the Evidence Act, 1872, to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone but such oral agreement must be clearly proved and the onus lies on him who sets it up.

If an admission in pleading is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.

The plaintiff sued the defendant upon a promissory note, jointly executed by the defendant and one *H*, for Rs. 50,000 payable on demand, alleging that under a certain agreement the plaintiff was bound to pay *H* Rs. 50,000 on 30th January 1908,

Evidence Act—concld.

but he agreed to prepay that amount on being given the joint promissory note in question of date 23rd December 1907, and the money was handed over to the defendant; that the plaintiff agreed that he would surrender the note if on 30th January 1908 *H*, who was largely indebted to him, had given sufficient security for the whole debt as then due by him; that on the 30th January no such sufficient security was given that accordingly he was entitled to maintain defendant's liability under the note. The defendant admitted the execution of the note, but pleaded that it was verbally agreed that his liability on it should cease on the 30th January 1908. The trial Judge allowed the parties to go to trial and examine witnesses. At the trial the defendant's true contention was that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the amount to be paid by the plaintiff to *H* on that date, and that the note should be re-placed by a single acknowledgment on the part of *H*. The trial Judge, coming to the conclusion that it had not been proved that any agreement had been made for the giving of security by *H*, gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at, because the promissory note constituted a written contract binding the defendant to pay on demand and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement:

Held, that if the defendant's pleading was to be dealt with in absolute strictness, the view of the Court of Appeal was right; but that his true contention, when put in the form of averment, would be an oral agreement in terms of proviso 2 to section 92, which would allow it to be proved.

Held, also, that inasmuch as the view of the Court of Appeal might have been obviated by a mere amendment of the pleadings and as the parties had been allowed to go to proof, the evidence led should be considered; and that as the defendant failed to discharge the onus that lay on him of proving the oral agreement set up by him, the suit must be decreed. **P. C.** MOTABHOY MULLA *v.* MULJI HARIDAS, 17 M. L. T. 402; 28 M. L. J. 589; 13 A. L. J. 529; 19 C. W. N. 713; 21 C. L. J. 507; 17 BOM. L. R. 460; 2 L. W. 524; (1915) M. W. N. 522; 39 B. 399 **223**

——— ——— **s. 94** **588**

——— ——— **s. 94**—Deed—Language plain and definite—Evidence, admissibility of, to prove language applies to other facts **201**

——— — — **s. 112**—Legitimacy **178**

——— ——— **s. 114, ill. (d)** **694**

——— — — **s. 115**—Estoppel — Subsequent contention negativing a prior one—Estoppel **25**

——— ——— **s. 125** **79**

——— ——— **s. 143** **513**

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——— ——— **s. 154** **513**

——— ——— **s. 157** **639**

Excise Act (XII of 1896), s. 45 **339**

Execution of decree—Application to set aside sale on ground of fraud and collusion, maintainability of—Minor substituted as judgment-debtor—Guardian *ad litem* not appointed—Sale, effect of **211**

——— ——— ———Arrest of judgment-debtor, when may be ordered **152**

——— ——— ———*Attachment*—Custodia legis—*Property not liable to be legally possessed by private persons, attachment of—Court, duty of—Beer, whether attachable and saleable—Excise Act (XII of 1896), s. 45.*

A *custodia legis*, such as the possession of attached property by a Civil Court executing a decree, requires no departmental sanction or license even, where the property is of a kind which cannot legally be possessed by a private person without such permission.

Therefore, the possession of attached property by a Court is no violation of the special law governing the possession of such property by private persons.

Where a District Judge passed an order attaching beer, an excisable property:

Held, that section 45 of the Excise Act had no application whatsoever to the acts of the District Court or any of its officials or agents acting under its orders.

It is the duty of every Judge to exercise the powers vested in him in such a way as to give effect to all provisions of the law.

Beer brewed within the local limits to which the Excise Act, 1896, applies is not exempt from attachment and sale in execution of a Civil Court decree.

Where a Civil Court attaches property of a nature governed by any Special law, such Court is bound to proceed with great circumspection so as not to defeat any of the purposes for which such Special law was enacted. **N.** BHARGAVA COMMERCIAL BANK, LTD. *v.* MACKINNON & Co., 11 N. L. R. 67 **339**

——— ——— ———*Benamidar*, right of, to execute decree **595**

——— ——— ———*Decree comprising property outside jurisdiction—Right to sell such property—Undervaluation, whether material irregularity—Civil Procedure Code (Act V of 1908), s. 115.*

The fact that all the property is not situated within the jurisdiction of the Court which passed the decree, does not affect its jurisdiction to sell the property comprised in the decree.

An undervaluation of property in the proclamation of sale is not a material irregularity within the meaning of section 115 of the Civil Procedure Code. **M.** HANSRAJ SAWCAR *v.* MOHIDEEN ROWTHER **745**

——— ——— ———Decree obtained by fraud or collusion, question of, whether relates to execution of decree—Attachment, whether gives any priority—Rateable distribution **239**

——— ——— ———*Execution Court, power of, to complete an ambiguous decree—Decree, ambiguity in.*

Where a decree is incomplete and ambiguous, it is not the duty of the Court executing the decree to complete it and to give a definite expression to the ambiguity. **A.** MUHAMMAD HASAN *v.* NIAZ HUSAIN, 13 A. L. J. 428 **213**

Execution of decree—contd.

——————— Inventory of property attached not annexed to application—Application, whether in accordance with law **479**

——————— *Money-decree — Attachment before judgment—Deposit in Court—Decree in favour of 3rd parties against judgment-debtor—Subsequent decree-holders, whether can attach money deposited in Court—First decree-holder's lien.*

The plaintiff in an action for money against one *K* got this property attached before judgment. Later, he obtained a decree, but its execution was stayed on the application of the judgment-debtor pending the decision of the appeal. Subsequently, with the consent of the parties the Court modified its order allowing *K* to sell the property on condition that after paying off the debts etc., he paid the remainder into Court as security for the decree against him. It was subsequently discovered that another creditor had a mortgage in his favour on the estate and in consequence of this both the parties arrived at a fresh agreement, the terms of which were embodied in an application to the Court signed by both the parties which stated specifically that the plaintiff should have a first lien on the balance for the sum for which he may ultimately get a decree. This application was granted and the property sold The plaintiff then filed cross-objections asking for a further sum and increased interest from the date of the institution of the suit. Ultimately the judgment-debtor's appeal was dismissed and the cross-objections partially accepted by the Chief Court.

During the pendency of the appeal the defendant obtained a money decree against *K* and attached the money paid by him into Court as security. The plaintiff objected, but the executing Court ordered rateable distribution. The plaintiff then sued for a declaration that he was entitled to payment in preference to the other decree-holders:

Held, (1) that the plaintiff was fully justified in bringing the declaratory suit;

(2) that the money was deposited by *K* and accepted by the Chief Court as security for the due performance of such decree as might ultimately be binding upon him and the defendant by attaching the money before the date of the final decree in favour of the plaintiff did not prejudicially affect the latter's rights. **P.** *Miss* HAMILTON *v.* SHANKAR DAS, 120 P. W. R. 1915 **791**

——————— *for partition of property based on award—One of the properties mortgaged by one of the parties to the decree—Separate suit to determine liability on mortgage, maintainability of.*

Where an award and the decree based thereon for partition of immoveable property make no mention of the encumbrance created thereon by one of the parties who are father and sons and where the mortgagees are no party to the proceeding, the executing Court is not competent to decide in execution of the decree, the respective liabilities of the parties as regards the mortgage. Such a question is a fit subject for a regular civil suit to be brought by the aggrieved party. **P.** NARPAT RAI *v.* DEVI DAS, 59 P. W. R. 1915; 139 P. L. R. 1915 **755**

——————— Personal decree against Hindu woman with limited estate—Debt incurred for legal necessities—Suit based upon allegations of

Execution of decree—contd.

necessity—Decree-holder entitled to prove necessity in execution—Payment of Government demands, whether legal necessity—One of several decree-holders can apply for execution of the whole decree **181**

——————— referred to Collector—Application to Civil Court to expedite execution, whether execution application—Power of Court to control Collector's proceedings **58**

——————— Sale—Minor widow brought on record as legal representative of her deceased husband, judgment-debtor—Court kept in ignorance of minority of widow—An earlier and higher bid for same property in another suit concealed—Sale void—Suit for declaration competent without regard to s. 47—Fraud—Limitation Act (IX of 1908), Sch. I, Arts. 12, 166, applicability of **314**

——————— Transmission of decree for execution by one Court to another—Transmission of that decree to another Court—No steps taken for six months to execute decree—Proceedings thereafter, whether void **119**

——————— *Uncertified payment under decree, recognization of—Instalment decree—Default—Limitation Act (IX of 1908), Sch. I, Art. 182 (7).*

An uncertified payment under a decree cannot be recognized for any purpose under the new Code of Civil Procedure.

Where a decree provides for payment of the money due under it in instalments and in case of default in payment of any of the instalments, the whole amount becomes payable at once, an application for execution should be made within three years of the first default. **A** AMIR SINGH *v.* CHHATTAR SINGH, 13 A. L. J. 666 **274**

——————— , who may come in in—Party having no interest in property when decree passed, right of **402**

——————— *against wrong representative—Sale—Property in hands of usufructuary mortgagee—Reversioner, suit by—Decree-holder purchaser, whether protected.*

In a mortgage suit the mortgagee obtained a decree against the mortgagor and on the latter's death brought his widowed daughter-in law on the record while his widow was still alive. He then proceeded to execute the decree and purchased the property himself at the Court sale. At that time the property was in the hands of a usufructuary mortgagee and when the estate fell into possession, the reversioners sued to recover possession:

Held, that inasmuch as the property was in the hands of a usufructuary mortgagee at the time of sale the purchaser acquired merely the equity of redemption and the sale could not be binding on the reversioners. **M** VUPPALAPATI VENKATAPPA *v.* THOVAGUNTA VIRARAGHAVAYYA **6**

——————— **proceedings**—Decree-holders of different Courts attaching in execution same property, right of, to rateable distribution—Court of highest grade—Transfer of decree **21**

——————— struck off through mistake of Court—Power to restore—Civil Procedure Code (Act V of 1908), ss. 141, 151, O. IX **592**

Execution of decree—concld.

——— ——— **sale**—*Auction-purchaser's right—Mistake or oversight in procedure, effect of.*

When the auction-purchaser, in execution sale of a mortgage decree is claiming possession from persons who could claim only through one or more of the mortgagors and whose claim has been declared unfounded, a mistake or oversight in the proceedings cannot affect the real substance and subject of the litigation between the mortgagors and the mortgagee. **L. B.** MAUNG MAUNG *v.* SAN NYEIN **17**

——— ——— ———Co-owner's interest—Auction-purchaser, assignee of—Title, acquisition of—Partition, right of—Limitation Act (IX of 1908), Sch. I, Art 144, applicability of—Adverse possession—Co-owner's possession **976**

——— ——— ——— *Occupancy holding not saleable—Sale held before application of objection heard—Irregularity—Proper procedure.*

Where in an execution proceeding for the sale of an attached holding, the Munsif allowed the application of objection to the sale to stand over and in the meantime held the sale without making inquiries into the objection raised by the judgment-debtor:

Held, that the proceedings of the Munsif were wholly irregular;

that the proper procedure in such a case for the judgment-debtor was to appeal against the order refusing to postpone the sale or directing the sale to take place. **C.** LAKENATULLA *v.* ASMATULLA SARKAR **616**

Ex parte decree. *See* DECREE.

——— ——— *Costs—Procedure to be adopted, when date of hearing holiday*—Ex parte *decree, setting aside of—Costs of adjournment—Appellate Court's power to cancel order of costs allowed by first Court.*

Where the date fixed for hearing a case happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon him a fresh notice of the hearing.

Passing an *ex parte* decree without duly serving the summons upon the defendant is wholly unjustifiable and liable to be set aside unconditionally.

A party having good and sufficient reason for non-compliance with an order of a Court cannot be burdened with the costs of an adjournment. **P.** UMAT-UL-MUGHNI BEGUM *v.* SALIG RAM, 51 P. W. R. 1915; 126 P. L R. 1915 **137**

——— ———, setting aside of. *See* CIVIL PROCEDURE CODE, 1908, O. IX, R. 13.

——— ———, *setting aside of—Application made after five years—Procedure—Jurisdiction—Revision—Limitation Act (IX of 1908), Sch. I, Art. 164—Civil Procedure Code (Act V of 1908), s. 115, O. IX, r. 13.*

An *ex parte* decree was passed in 1909 when the defendant was in jail. An application to set aside the decree was made in 1913 when the defendant was released from the jail. The Munsif without considering whether the application was barred by limitation granted it on the ground that the defendant being in jail at the time of the hearing of the suit had been prevented from attending the Court and defending it properly:

Ex parte decree—concld.

Held, that the proceedings of the Munsif were irregular and without jurisdiction.

That the Munsif ought to have considered whether the application before him, treated as an application under Order IX, rule 13, of the Civil Procedure Code, had been made within time, or if he treated the application as one for review of judgment, he should have considered whether the applicant had established sufficient cause for not applying till after five years had expired since the passing of the decree. **A.** JANKI PRASAD *v.* PARMESHWAR DIN PANDEY, 13 A. L. J. 482 **975**

Explosive Substances Act (VI of 1908), s. 4 (b), *offence under—Prosecution, right of, to prosecute for the offence irrespective of ultimate design of conspiracy—Explosive substances, nature of—Possession of explosive substances—Knowledge and assent, if necessary.*

Where an offence is committed under section 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute the accused for such offences, irrespective of the question of the ultimate design of the alleged conspiracy.

Any part of any apparatus, machine or implement intended to be used or adapted for causing or aiding in causing any explosive substance, is included in the term 'explosive substance' as used in section 4 (*b*).

The explosive substance mentioned in section 4 (*b*) of Act VI of 1908 need not be such as to enable a person by means thereof alone, without the aid of other substances, to cause danger to life or injury to property.

In a charge under section 4 (*b*) of the Explosive Substances Act, 1908, possession to be punishable must also be possession with knowledge and assent. **C.** AMRIT LAL HAZRA *v.* EMPEROR, 21 C. L. J. 331; 19 C. W. N. 676; 16 Cr. L. J. 497 **513**

Ex-proprietary right. *See Sir* LAND.

Fact, finding of—Evidence not referred to in judgment, effect of **710**

Factor, definition of **462**

Factum Valet, principle of, how far applicable to marriage in Muhammadan Law **871**

Falsification of document. *See* PENAL CODE, s. 477A.

Ferry—*Crown grant—Right to ply boats—Prescription.*

The plaintiffs were the owners of *Mouza* R and the defendants of *Mouza* B. Between villages R and B flowed the river G. The plaintiffs alleged that they were entitled to ply boats across the river and to disembark passengers on land belonging to the defendants and prayed that the defendants be restrained from obstructing:

Held, that the use of a ferry by the *zemindars* of *Mouza* B, which had been found to be a long and continuous use, was entitled to prevail until the plaintiffs, who were starting up an opposition ferry, could show a Crown grant or could give evidence from which a Crown grant could be presumed. **A.** JWALA SINGH *v.* ABDUL RAZAK, 13 A. L. J. 775 **692**

Foreclosure suit—Appeal for enhancement of mortagage-money—Court-fee to be *ad valorem* **609**

Forest Act, s. 25 (d) 325

Forest land—*Proof of possession—Acts of ownership quite essential to determine title—Nature of evidence to prove title and possession.*

Where the defendants are shown to be in possession of certain forest land, the plaintiff in order to establish his claim to it must prove definite acts of ownership exercised by him on the land from time to time.

A sketch prepared by one of the parties at a time when the Government attempted to take up these lands under the Land Acquisition Act before any controversy as to the boundary of these lands arose is strong cogent evidence to prove ownership. **M.** MANJERE KARNAMULPAD *v.* KOZHIKOTE KIZHAKKE 729

Forfeiture. *See* LANDLORD AND TENANT.

———— *Anubhavam* tenure—Denial of landlord's title, whether works forfeiture of tenancy 427

Fraud, allegation of—Mortgage-decree, sale under 402

———Auction-sale—Bidder *benamidar*—Misrepresentation 12

———*Contemplated fraud not effected, effect of—Fraudulent confiderate, when can take advantage—Equitable relief—Collusive decree—Agreement not to execute, effect of.*

Where the contemplated fraud has not been effected, a party to the fraudulent transaction does not lose his right to be relieved from the effect of such a transaction.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must be effected when and when alone does the fraudulent grantor or giver lose his right to claim the aid of the law to recover the property he has parted with.

The principle, that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against his fraudulent confederate so long as the fraud contemplated has not been carried into effect, is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme.

Where, therefore, the defendant obtained a collusive decree against the plaintiff promising to execute only against the plaintiff's brother and then sued out execution against the plaintiff himself, on a suit to have it declared void and of no effect:

Held, that even if the plaintiff could not impugn the decree he was entitled to relief having regard to the agreement that it could not be enforced against him. **C.** RAJAB ALI *v.* HEDAYET ALI, 19 C. W. N. 1151; 22 C. L. J. 197 699

————, *plea of—Issues—Allegations, mere, not sufficient.*

No man ought to be found guilty of fraud and collusion of a particularly gross kind of fraud unless it is clearly and unambiguously alleged and put in issue against him.

Therefore, in a suit upon an indemnity bond the plea that the damnification suffered by the plaintiff is the result of his negligent and fraudulent conduct in the previous litigation ought to be in issue against him in clear terms; it is not enough that there are allegations in the written statement from which a plea of this kind could be spun out. The plea should be clearly and distinctly raised. **M.** SANKUNNI MENON *v.* NALLAPPAH RAMUNNI MENON 482

Fraud—concld.

————*Suit for setting aside decree obtained by fraud not brought—Fraud can be still relied upon.*

A party can rely on fraud even though he has not brought a suit to set aside the decree alleged to have been obtained by fraud. **C.** KURARAM DATTA *v.* BANOMALI PATRA 838

Fraudulent decree, suit to set aside, when maintainable—Consequential relief, necessity of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when not permitted 132

———— **transfer.** *See* TRANSFER OF PROPERTY ACT, s. 53.

———————*Estoppel, principle of—Duty to speak—Purchaser at execution sale, if can question transferability—Auction-purchaser equally bound with judgment-debtor—Co-sharer landlord, power of, to raise question of transferability—Non-transferable occupancy holding, sale of, effect of.*

Where there is nothing to show that a transferor intended a sale of his immoveable property as a cloak or device for his own protection and where the *bona fides* of the transfer cannot be doubted, the transfer cannot be impeached as fraudulent.

The case, where the person against whom the estoppel is sought to be applied is under no duty to speak, is not covered by the principle that where a person, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter that a different state of things existed at the time.

A purchaser at an execution sale is not entitled to raise the question of transferability of the holding and is bound by the same rule of estoppel as the judgment-debtor.

A co-sharer landlord having a three-fourths share is entitled to raise the question of transferability of the holding.

The purchaser can be evicted by any of the co-sharer landlords to the extent of his own share, in a sale of a non-transferable occupancy holding, and if possession of the entire holding has been acquired by some of the co-sharers the other co-sharers are entitled to joint possession thereof. **C.** KANCHAN MANDAR *v.* KAMALA PROSAD, 21 C. L. J. 441 734

Gift. *See* HINDU LAW; MUHAMMADAN LAW.

———*made in contemplation of death—Possession not delivered, effect of—Better title to be shown by person not in possession.*

A gift made in contemplation of death and intended to operate only after the donor's death is inoperative and void.

A person not in possession ought to show a better title to the property from which he seeks to eject the person in possession. **L B.** MAUNG PO YIN *v.* MG. NI, 8 BUR. L. T. 72 888

Grant—Kayam patta—*Construction—Surrounding circumstances and conduct of parties.*

Grant—concld.

Where a grant under the heading *kayam patta* was made in 1857 and the grantees dealt with their tenants as if they were entitled to permanent rights and in compensation for acquisition of land for public purposes the grantee and grantor both shared and evidence proved that the grantor regarded the grant in the terms of neighbouring villagers as a permanent grant:

Held, that a heritable permanent grant was conveyed in those terms.

Wallis, C. J.—*Prima facie* the words "*kayam patta*" mean 'perpetual lease.' But a long course of decisions have held that these words and the words "*istimrari mokurari*" and "*kayam sasvata*" do not *prima facie* convey more than life-estates. When land or interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson' or 'from generation to generation' or the like. In construing grants one has to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant.

Coutts-Trotter, J.—In *Tulshi Pershad Singh* v. *Ram Narain Singh*, 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar. P. C. J. 646, the Privy Council have expressly used those words to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction. **M.** VENKATARAMANNA *v.* VENKATAPATHI NAYANI VARU, 17 M. L. T. 269; 28 M. L. J. 510; (1915) M. W. N. 313 **188**

——— *Occupancy right, if acquired after grant—Bengal Tenancy Act (VIII of* 1885)*—Eviction—Only occupancy* raiyat *protected by law.*

If at the date of the grant of a permanent interest there was no occupancy right which had matured, an occupancy right cannot be acquired after the date of the grant.

It is not every *raiyat* who is protected from eviction but only an occupancy *raiyat*, under the Bengal Tenancy Act, VIII of 1885. **C.** AKHIL CHANDRA SEN *v.* TRIPURA CHARAN **563**

Grove—*Custom—Tenant, right of, to cultivate—Payment of rent—Landlord, right of, to get rent assessed.*

A tenant is not entitled to bring a grove land under cultivation and to hold it free from payment of rent. The land-holder is entitled to have rent assessed on such land. **U. P. B. R.** BHARAT INDU *v.* MISRI **34**

——— ——— *Fruit orchard or timber grove—Tenant—Occupancy rights, acquisition of—Land—Agra Tenancy Act (II of* 1901), *s.* 11.

Where a fruit orchard or timber grove has been planted, the grove-holder cannot be ejected as a tenant from year to year so long as the land maintains its character as a grove. Nor can he acquire occupancy rights so long as it remains a grove, because in either case, land is not land within the meaning of the Tenancy Act in which only occupancy rights can accrue. It becomes land after the disappearance of the grove. **U. P. B. R.** MUHAMMAD ABDUL HAFIZ KHAN *v.* RAM RATAN LAL **20**

——— ——— Improvement **410**

———, *mortgage of—Mortgagor dying without heirs—Mortgagee, whether can be ejected—Grove, if constitutes improvement.*

Grove—concld.

A tenant who had acquired occupancy rights over certain land subsequently planted a grove over it and mortgaged the same usufructuarily. Upon the death of the tenant without heirs, the *zemindar* sued the mortgagee for ejectment on the ground that he was a non-occupancy tenant of less than 12 years' standing:

Held, that as the transfer of the grove by mortgage was a valid transfer and the rights of the mortgagor passed to the mortgagee, the mortgagee could not be ejected.

Held, further, that the order of ejectment in such cases implies the confiscation of existing valuable rights under a law which is entirely irrelevant and is, therefore, so serious a mistake of law as to amount to an illegality.

Held, also, that the grove having been planted before the Tenancy Act is not an improvement for which compensation can be allowed to the mortgagee and an order of his ejectment passed. **U. P. B. R.** PAYAG CHOWBEY *v.* BIJIANAND **560**

Grove-holder—Grove brought under cultivation—Grove-holder, whether becomes a tenant *ipso facto*—Wrongful dispossession **447**

Guardian ad litem, appointment of—Consent of proposed guardian, necessity of—*Ex parte* decree against minors, when liable to be set aside **579**

——— ——— ——— ——— *Mother acting as such—Decree, validity of—Mother not defending suit, if sufficient ground to set aside decree.*

The father of the plaintiff was murdered leaving his widow and the plaintiff, a minor, him surviving. The motive of the murder was to take possession of property which belonged to the plaintiff's father. Suits had to be brought in the name of the minor. The mother of the minor borrowed on mortgages on behalf of the plaintiff as his guardian for the expenses of the suit. Suits were thereafter brought on these mortgages and decrees were obtained. The plaintiff sued to set aside these decrees:

Held, that the mother was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court and that if the decrees were fairly and properly obtained against the minor as represented by his mother, the decrees were binding and the Court could not go behind them.

Held, further, that the mere fact that the mother did not defend the suits on the mortgages would not make the decrees invalid. **A.** COLLECTOR OF MEERUT *v.* UMRAO SINGH, 13 A. L. J. 437 **220**

Guardians and Wards Act (VIII of 1890)—*Custody of child, suit for, maintainability of—Jurisdiction, objection as to, when taken.*

The Guardians and Wards Act (VIII of 1890) forbids proceedings being taken in the ordinary way touching the guardianship of infants. A suit for custody of a child must be brought under the Guardians and Wards Act which Act gives jurisdiction to the District Court over minors ordinarily resident in the District.

An objection as to jurisdiction can be raised at any stage of the proceedings. **L. B.** ARUNACHALLAM PILLAY *v.* IYAMA, 8 BUR. L. T. 128 **768**

——— ——— ——— ——— **S. 9** **890**

Guardians and Wards Act—contd.

——— ——— ——— **ss. 12, 25**—*Guardian of minor's person—Court's power to put minor in possession of guardian.*

Where a person has been appointed guardian of the person of a minor, the proceedings cannot be regarded as complete until the guardian has obtained effective possession of the person of the ward. If the guardian is not in such possession, the Court should take action under section 12 of the Guardians and Wards Act (VIII of 1890) to place the minor in his possession. **A.** UTMA KUAR *v.* BHAGWANTA KUAR, 13 A. L. J. 742 **416**

——— ——— ——— **ss. 17, 19**—*Father marrying second wife, whether sufficient ground to deprive him of his children's guardianship—Guardianship of husband and father and of other relations, distinction between.*

The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children.

A distinction exists between the guardianship of a father or a husband and that of other near relations. The former could be deprived of the right of guardianship only *when he is found to be unfit to be the guardian of children or wife* and the latter, when it does not conduce to the welfare of the children. **M.** AUDIAPPA PILLAI *v.* NALLENDRAN PILLAI, 28 M. L. J. 442; (1915) M. W. N. 330; 17 M. L. T. 389 **4**

——— ——— ——— ——— **s. 17 (1)** **890**

——— ——— ——— **s. 19** **4**

——— ——— ——— **s. 19**—*Minor, appointment of guardian for—Father available—Other person, when appointed guardian.*

Where a father is available as guardian no other guardian can be appointed unless he is in the Court's opinion unfit for appointment. **M.** SUBRAMANYA PILLAI *v.* AMMAYEE AMMAL, (1915) M. W. N. 414; 2 L. W. 531 **740**

——— ——— ——— ——— **s. 19 (b)** **890**

——— ——— ——— **s. 25** **416**

——— ——— ——— ——— **ss. 29, 31**—*Permission to guardian to sell ward's property—Power of Court to stop sale if detrimental to ward—Specific Relief Act (I of 1877), ss. 38, 41—Plaintiff repudiating transaction must restore benefits received only if other party acted in good faith—Defendant not to restore benefits.*

The Legislature did not intend that a Court should give permission to a guardian to sell the ward's property without fixing at least an approximate price and without clearly ascertaining what is to be sold and the value of it.

Even if a Court has given sanction under section 29 and section 31 (1) it is not beyond the power of that Court to intervene and stop the sale, if it finds something detrimental to the ward's interest is contemplated.

If a plaintiff sues to undo a transaction entered into by his guardian in his name during his minority, then *if the other party has acted in good faith and the plaintiff or his estate has actually received benefit*, the plaintiff must, as a condition precedent to the undoing of the said transaction, restore the said benefit. If, however, the minor or *quondam* minor

Guardians and Wards Act—concld.

is the *beatus possidens* and is being sued by the other party, a claim against the minor for refund of the benefit would fail. **P.** SULTAN SINGH *v.* HASHMAT ULLAH, 19 P. W. R. 1915 **804**

——— ——— ——— ——— **s. 31** **804**

Hakim performing operation on eyelids—Ordinary precautions not taken—Acting rashly and negligently—Hurt—Offence—*Hakim* giving himself out as skilled operator, liability of **69**

High Courts Act. *See* CHARTER ACT.

Hindu Law—Adoption—Datta homam *ceremony, when unnecessary—Same* gotra, *effect of—Pleadings Fraud, coercion, misrepresentation and undue influence should be separately and specifically pleaded—General allegations insufficient—Evidence Act (I of 1872), ss. 33, 145, 157—Previous statements, when and how to be used—Civil suit—Procedure—Documents to contradict witnesses—Witness to be given opportunity to explain.*

Where the child to be adopted belongs to the same *gotra* as that of the adoptive father, the celebration of the ceremony of *datta homam* is not an essential to the legal validity of an adoption, that is to say, within the same *gotra* the ceremony is unnecessary.

Allegations amounting to fraud, misrepresentation, coercion and undue influence should not be mixed together, as these are all separate and separable categories in law, though it is true that they may overlap or may be combined.

Fraud, misrepresentation, coercion and undue influence cannot be imported into a case by suggestions but must be specifically and distinctly pleaded.

With regard to fraud if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice.

A civil cause must be conducted in the ordinary and regular way and judged of by the evidence led therein.

Unless it is proved that a "witness is dead or cannot be found, etc." the evidence given by such witness in a previous judicial proceeding is irrelevant for the purpose of proving in a subsequent proceeding the truth of the fact which it states, nor can it be used for the purpose of either contradicting or discounting the evidence of the witness in the subsequent proceeding unless the particular matter or point had been placed before the witness as one for explanation in view of its discrepancy with the evidence then being tendered.

If a witness is under cross-examination, he should be given the opportunity, if any documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This rule must be particularly enforced where a witness's reputation and character are at stake **P. C.** BAL GANGADHAR TILAK *v.* SHRI SHRINIWAS PANDIT, 13 A. L. J. 570; 19 C. W. N. 729; 17 BOM. L. R. 527; 22 C. L. J. 1; 29 M. L. J. 34; 18 M. L. T. 1; (1915) M. W. N. 484; 2 L. W. 611; 42 C. 739; 39 B. 441 **639**

——— Adoption—*Suit by presumptive reversioner to set aside adoption—Death of plaintiff—Right of next presumable reversioner to continue suit—Suits to impugn validity of transactions by Hindu females—Plaintiff in such suits represents all reversioners—Right of contingent reversioners to join as plaintiffs—Abatement of suit—Substitution—Limitation Act (IX of* 1908), *Sch. I, Arts.* 118, 125, *distinction between—Civil Procedure Code* (*Act V of* 1908), *O. I, r.* 1.

A suit brought by a presumptive reversioner for a declaration that an alleged adoption is invalid is brought by him in a representative capacity and on behalf of all the reversioners, and on the death, therefore, of the presumptive reversioner the next presumable reversioner is entitled to continue the action begun by the deceased plaintiff.

The two classes of cases covered by Article 118 and Article 125 of Schedule I of the Indian Limitation Act (IX of 1908) are distinct in their scope and character and differ widely in their language. The former Article relates to status and involves the adjudication of a right *in rem*, and the latter raises the question of mere justifiable necessity. In both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

A remote reversioner is not precluded from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. **P. C** VENKATANARAYANA PILLAY *v.* SUBBAMMAL, 28 M. L. J. 535; 17 M. L. T. 435; 21 C. L. J. 515; 17 BOM. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; 38 M. 406; (1915) M. W. N. 555 **298**

——— ——— ———, *suit to set aside—Plaintiff and his mother living together—Knowledge of plaintiff's mother, whether knowledge also of plaintiff—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 118.

Where both the plaintiff and his mother live together in the same house, his mother's knowledge as to the date of a certain adoption is also his knowledge for purposes of Article 118 of the Limitation Act (IX of 1908). **M.** VEMOORU AUDI NARAYANIAH *v.* PANCHAGNULA SREERAMULU **785**

——— ——— ——— *Testamentary direction to adopt a certain boy given to widow—Death of adoptee—Second adoption, whether valid.*

A Hindu embodied in his Will a direction to his widow to adopt a certain boy and to put him in possession of all property at the end of her life. The widow did adopt the boy who, however, having died, she adopted another. The reversioners of the first adoptee sued to set aside the second adoption:

Held, Per *Sankaran Nair, J.*—(1) that the question whether the Will authorised a second adoption on the death of the first adoptee was one of intention to be gathered from the terms of the Will and the surrounding circumstances.

An authority to adopt expressed in a Will must be construed with reference to the presumption that a Hindu testator always intends the perpetuation of his family and that authority to adopt one specific child should, in case of that child's death, be held to

warrant the adoption of another unless there is something in the Will itself to show that the testator did not desire any other adoption to be made.

Per *Oldfield, J.* (*dissenting*).—A Hindu testator who authorises an adoption generally must be presumed to do so with the primary intention that his widow shall secure his posthumous representation by an adopted son and make successive adoptions until that object is secured.

Where there is a conflict between the general presumption as to a testator's intention and the explicit or implied restriction contained in the Will itself the proper course is to attempt to ascertain with reference to the testator's own words and without reference to the general presumption whether he meant to restrict the authority he was conferring; and to have recourse to that presumption only after such attempt has failed.

Where the terms of the Will are clear and express it is not open to Court to add to those terms.

Where the Will contains a provision that the estate should pass on the widow's death to the adopted son and does not at the same time make a provision as to its succession on the death of the adopted son, it is clear that the testator was either indifferent or content to leave his widow to adopt with the consent of the *sapindas*. An intention to confer on the widow, authority to make successive adoptions cannot be inferred from that act of his. **M.** CHENGA REDDI *v.* VASUDEVA REDDI, 2 L. W. 562 **770**

——— Adoption—*Widow, whether can validly adopt her brother's son to her deceased husband—Authority given by husband—Duty of lower Court to follow decision of High Court—Practice.*

A widow who has the express authority of her deceased husband to adopt as a son to him her brother's son, can validly do so.

A subordinate Court is bound to follow the decision in law of a Bench of the High Court to which it is subordinate, unless the decision of the Bench has been overruled by a decision of a Full Bench of that Court or unless it has been overruled expressly or impliedly on an appeal to His Majesty in Council or unless the law has been altered by a subsequent Act of the Legislature. **P. C.** PUTTU LAL *v* PARBATI KUNWAR, 19 C. W. N. 841; 13 A. L. J. 721; 17 BOM. L. R. 549; 18 M. L. T. 61; 29 M. L. J. 63; 22 C. L. J. 190; 37 A. 359 **617**

——— ——— ——— *Widow, whether can adopt in presence of natural son—Invalid adoption—Ceremonies, effect of—Maintenance—Performance of declaration during negotiations, value of.*

In the presence of a natural son of a deceased Hindu, his widow cannot be presumed to have any authority from him to adopt, and if she does adopt a boy, the adoption will be invalid.

A boy whose adoption is found to be invalid, has no right to be maintained out of the estate of the adoptive family. The mere fact that ceremonies were properly performed and that the widow thought that she had authority to adopt would not affect the question.

A declaration or statement marking a stage in the negotiations as to the proposed amicable settlement between the parties, while admittedly

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document giving effect to the declaration or statement was to be executed later on, is an undertaking, which, unless completed, may be broken off at any time by either side. **B.** DALPATSINGJI *v.* RAISINGJI NAHARSINGJI, 7 BOM. L. R 566 **943**

——— **Alienation**—*Absolute alienation of joint family property in lieu of maintenance, whether legal.*

An absolute alienation of joint family property to a maintenance-holder in lieu of maintenance is not necessarily illegal. **M.** SUNDARAM AIYAR *v.* SUBBAMMAL **23**

——— **by widow**—*Legal necessity—Knowledge and consent of next heir—Construction of deeds—Guiding principle.*

Deeds and contracts of the people of India ought to be liberally construed. The real meaning of the parties ought to be given effect to rather than the literal sense.

Where, therefore, in order to pay off some existing ancestral debts and some others contracted by her for necessity, a Hindu widow sold a house with the knowledge of her daughter, whose husband attested the deed of sale, and the debts were, as a matter of fact, paid out of the purchase-money and the recitals in the deed of sale conta ned a detailed account of the circumstances under which the house was being sold, and the vendor purported to convey all her own existing right, title and interest in or belonging or appertaining to the houses including easements, and declaring that the vendee shall be full owner and proprietor of the house sold:

Held, that the widow intended to convey absolute property in the house to the vendee and the daughter could not challenge the alienation. **P. C.** THAKUR VASONJI MORARJI *v.* CHANDA BIBI, 19 C. W. N. 873; 17 BOM. L. R. 556; 18 M L. T. 31; (1915 M. W. N. 449; 2 L. W. 676; 22 C. L. J. 180; 37 A. 369; 29 M. L. J. 130 **781**

——— Necessity—Payment of debt due by husband—Payment of barred debt—Payment out of income of property **780**

——— *Attestation of deed by reversioner, whether amounts to consent of reversioner—Attestation, when assent—Question of fact—Existence of daughter, whether bar to suit for declaration by reversioner.*

The presence of a daughter is no bar to a suit for declaration, by a reversioner to the estate of a Hindu widow that an alienation made by her is void.

Mere attestation of an instrument by a reversioner does not necessarily import concurrence by him. It may, no doubt, be shown by other evidence that when the reversioner became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise.

The question whether the attestation of a document should be held to be simply assent is a question of fact and must be determined with reference to the circumstances of each case. **A.** LAKHPATI *v.* RAMBODH SINGH, 13 A. L. J. 616; 37 A. 350 **218**

Hindu Law—contd.

——— **Gift** *by Hindu widow to her husband's niece after consummation of latter's marriage, whether valid—Improvements,* bona fide, *by donee—Compensation.*

A Hindu widow has no right to make a gift, even of a reasonable portion of her husband's property, to a lady born in her husband's family after the consummation of that lady's marriage.

Where the donee or her representatives effect, during the period they are in possession, *bona fide* improvements on the property they are entitled to claim compensation for the same and a decree in ejectment should not be passed until the value of such improvements is paid to them. **M.** KALAVAGUNTA SINGARA CHARLU *v.* SREEMAN GUDIMALLA **269**

——— **Impartible estate** *Right of a junior member to maintenance—Co-parcenary right—Pittapur* Zemindari—*Maintenance grant.*

The *Zemindari* of Pittapur is an impartible estate governed by the *Mithakshara* Law and descending by lineal primogeniture.

The plaintiff's father was adopted by the late *zemindar* who by a Will and an agreement gave him a maintenance. On the *zemindar's* death the plaintiff's father sued to recover the *zemindari* on the ground that the Will was invalid and that the defendant was not the Raja's natural son. The Will was upheld and the suit was dismissed. The plaintiff seeking maintenance from the defendant but denying his co-parcenary relationship with the defendant:

Held, that the plaintiff was not entitled to any maintenance.

As the agreement with the plaintiff's father for maintenance did not expressly state that it was for the plaintiff's father and his heirs, it could not be construed to have made a permanent provision for the grantee and his descendants.

Prima facie, a provision for maintenance by a grant of money allowance is temporary. Grants to be construed as permanent provisions must be supported by unambiguous language or by a course of conduct and enjoyment by the grantee's descendants for a very long time.

Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the *Mithakshara* Law is created by birth, does not exist. The right to maintenance cannot, therefore, be a right which arises out of the co-parcenary interest of the property or which arises out of any community of interest acquired by birth. The right to get maintenance is not evidence of any community of interest which the members of the family acquire by birth.

A junior member of the family of the holder of an impartiable *zemindari* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship and not on account of any interest in the property.

Where the plaintiff bases his claim to maintenance on no relationship, there is no community of interest and the property is not burdened with his maintenance in the hands of a donee. **M.** RAMA ROW *v.* RAJAH OF PITTAPUR, (1915) M. W. N. 369; 28 M. L. J. 624 **356**

Hindu Law—contd.

——— **Joint family**—*Act of trespass committed by one member—Benefit to other members—Presumption.*

Under Hindu Law it must not be presumed that one member of a joint undivided Hindu family prescribes also for the benefit of his other co-parceners. **M.** VENKATACHELAPATI RAO *v.* JAYARAMAYYA **455**

——— — *Alienation by father—Attestation by major son—Legal necessity*—Karta—*Suit by minor son to set aside alienation, maintainability of—Consent—Attestation.*

P and his two sons *G* and *R* constituted a joint Hindu family, *G* being major and *R* minor. *P* alienated joint family property and the sale-deed was attested by *G*. In a suit by *R* to set aside the alienation:

Held, that there being no legal necessity for the sale, the son could contest the alienation and that though the powers of a Hindu father as manager of a joint family were extensive, they did not extend to the alienation of joint ancestral family property otherwise than for legal necessity and that it was doubtful whether consent could rightly be inferred from mere attestation in the absence of other evidence. **A.** PACHKAURI RAUT *v.* RAM KHELAWAN CHAUBE **749**

——— ——— ——— — Alienation of joint family property—Suit by minor member after attaining majority against vendee for possession of his share in immoveable property Limitation **199**

——— *Dancing sisters living together—Property standing in name of one of them—Presumption of jointness—Statements by deceased mortgagor in mortgage-deed as to ownership of property—Evidence Act* (*I of* 1872), *s.* 32 (7).

The ordinary presumption, that property standing in the name of one member of a Hindu co-parcenary is the property of all, does not apply to dancing sisters living together, as their mode of acquisition of property and life, are entirely distinct and different

Statements in mortgage-deeds made by a deceased mortgagor as to the ownership of the property comprised in the mortgage are admissible in evidence under section 32 (7) of the Indian Evidence Act and can be acted on if corroborated by other oral evidence in the case.

Quære.—Whether an adoption by a dancing girl is valid? **M.** VISALAKSHI AMMAL *v.* DORASINGA PILLI **974**

——— ——— — ——— *Gift in favour of one member of family—Property treated as joint property—Burden of proof—Donee's marriage expenses met out of joint funds—Lien on gifted property.*

Prima facie a property acquired under a gift by one member of a joint Hindu family belongs exclusively to him; if other members of the family allege that it was treated as joint family property it is for them to prove it.

The fact that the expenses of the marriage of that member of the family, in whose favour the gift had been made, were met out of the joint family funds, gives the joint family no lien on the gifted property. **A.** GHASI RAM *v.* DEBI **190**

Hindu Law—contd.

——— **Joint family**—Suit by minor—Managing member acting as next friend—Managing member, right of, to withdraw money—Security, deposit of —Court, duty of **475**

——— ———. — *Suit against all adult members—Subsequent suit by a minor member to set aside decree on ground that he was no party to former litigation—Burden of proof—Legal necessity.*

A suit was brought against all the adult male members of a Hindu joint family on the basis of a mortgage-deed executed by all the adult male members and a decree was obtained. In execution of the decree, the mortgaged property was foreclosed and the decree-holder obtained possession of it. Subsequently, a minor member of the family brought a suit to set aside the decree on the ground that he was not a party to the suit in which the decree had been obtained:

Held, that he was fully represented in the former litigation; that he was not entitled to any relief on the mere ground that he was no party to the former suit and that it was necessary for him to prove in the present case that the loan was not taken for a family necessity. **A.** KATWAROO SINGH *v.* DHARAM DEO SINGH **926**

——— ——— **Maintenance** *to widow provided for by agreement in writing—Subsequent unchastity—Rights, if forfeited—Starvation allowance, when allowed.*

The rule that by subsequent unchastity a Hindu widow forfeits her right to maintenance, applies even where that right is secured to her by an agreement in writing.

An unchaste Hindu widow, if she repents of her conduct and leads a moral life on the date of suit, is entitled to at least a starvation allowance. **M.** SATHYABHAMA *v.* KESAVACHARYA, 18 M. L. T. 28; 29 M. L. J. 87 **397**

——— ——— **Mortgage** *of family property—Liability of sons and grandsons—Legal necessity.*

The sons and grandsons of a Hindu mortgagor mortgaging the family property are not bound under the mortgage in respect of that part of the consideration, which was paid in cash at the registration office but not required for legal necessity. **A** KUNNU MAL *v.* TARA CHAND **152**

Mitakshara — *Mortgage by father—Debt neither antecendent nor for family purposes, nor immoral—Suit against sons—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 120, 132.

The decision of the Full Bench in the case of *Luchmun Dass* v. *Giridhur Chowdhry*, 5 C. 855; 6 C. L. R. 47 : 3 Shome L. R. 143, has not been overruled by the Privy Council, nor has it been superseded by subsequent legislation, inasmuch as, where the mortgage is not operative as such against the sons, no question can arise as to the effect of section 85 of the Transfer of Property Act (now re-placed by rule 1 of Order XXXIV of the Code of Civil Procedure, 1908).

A suit upon a mortgage effected by a father governed by the *Mitakshara* Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral, brought after the death of the father against the sons, some of whom were adult and some minors, at the time of the mortgage

Hindu Law—contd.

is governed by Article 120 of the first Schedule to the Indian Limitation Act, and not by Article 132, as there is no charge on immoveable property enforcible against the sons. **C.** BIDYA PROSAD SINGH *v.* BHUPNARAIN SINGH, 21 C. L. J. 543; 19 C. W. N. 849 **629**

——— ———**Partition** *between father and son—Grandmother, whether entitled to share.*

At a partition between a father and his sons, the grandmother is not entitled to a share under the *Mitakshara* Law. **A.** CHUMMUN PRASAD CHOUBE *v.* PRANPAT CHOUBE **166**

——— ——— Mitakshara — *Joint family property—Lunatic co-parcener—Lunacy not congenital but subsequent—Right of such co-parcener to share on partition.*

Where the plaintiff, a lunatic, sued through a next friend for partition of the family estate of which he would, if sane, be certainly entitled to a share, and it was found that the lunacy was not congenital but subsequent:

Held (per *Crouch, A. J. C.*), that there was nothing in the *Mitakshara* from which could be deduced a clear rule of law that a man who on birth entered into a joint family holding joint property, lost that interest on becoming lunatic.

Per *Fawcett, acting J. C.*, (dissenting).—That the *Mitakshara* intended the rules relating to 'exclusion from inheritance' to apply to both cases of inherited, as well as joint family property; that the principle on which the disqualification is based, *viz.*, the inability to perform sacrifices, applied equally to cases other than congenital; and that the plaintiff being insane at the time of the proposed partition was excluded from any participation in the joint estate.

Held (per *Pratt, J. C.*), that under the *Mitakshara*, which is the paramount Hindu Law authority in Sind, the disqualifications relating to 'exclusion from inheritance' apply not only to cases of obstructed but also to cases of unobstructed heritage, but in the case of the latter in joint family property they must apply at the time of birth for that is the time when the rights would accrue if there were no disabilities; that to hold otherwise would necessitate the divestment of rights already vested, which is contrary to the general rule of Hindu Law; and that, therefore, subsequent lunacy could not divest the plaintiff of his right to the joint family property. **S.** HOTCHAND GULABRAI *v.* MANGHANMAL GULABRAI, 8 S. L. R. 279 **42**

——— ——— ——— *not by metes and bounds, effect of—Tenants-in-common—Adverse possession—Relinquishment—Ouster—Evidence of exclusion—Limitation Act* (*IX of* 1908), *Sch. I, Art.* 127.

Where the members of a joint undivided Hindu family are divided in status, but do not effect a division by metes and bounds, they are tenants-in-common and the possession of one such tenant enures to the benefit of another, unless such another is shown to have renounced his share of the property in possession of the tenants-in-common or there has been something amounting to his ouster.

Where no ouster is proved there cannot be said to be an "exclusion" from joint family property within the meaning of Article 127, Schedule I of the Limitation Act.

Hindu Law—contd.

Where one of the members of a co-parcenary was shown to be in possession of the house site and he erected upon it a superstructure, the proper decree to be passed is to allow him to retain the house site and direct him to pay its price to the other co-sharer who claims a share in the house site alone. **M.** DEVARASU VENKATACHALA DWARAKA NADHA RAO *v.* DEVARASU VENKATARAO PANTULU, 17 M. L. T. 361 **183**

Partition—*Provision in partition deed that on death of one brother without male issue his share should pass to survivors—Provision, whether illegal—Transfer of* spes successionis—*Restraint upon alienation.*

A provision in a partition-deed among brothers, that on the death of any one of them without male issue his share must pass to the survivors who should divide it rateably among themselves, is not illegal; it is not a transfer of a *spes successionis* within the meaning of section 6 (*a*) of the Transfer of Property Act, nor is it a restraint upon alienation.

Per *Wallis, C. J.*—Where a contract to dispose of property by Will is upheld there is no reason why a similar contract to dispose of it by settlement during one's life-time cannot also be given effect to.

Per *Seshagiri Aiyar, J.*—A contract to devise lands can be enforced by persons claiming under the party who makes the contract.

A settlement unless it alters the line of succession, should be upheld.

Agreements not to divide property are enforceable although they would not preclude a party entering into such an agreement from alienating it.

Parties who are entitled to divide a property can waive their rights but they cannot, by such an arrangement, alter the mode of succession. **M.** MUTHURAMAN CHETTIAR *v.* PONNUSWAMY UDAYAR, (1915) M. W. N. 405; 2 L. W. 533; 18 M. L. T. 124; 29 M. L. J. 214 **549**

———— **Stridhanam**—*Property acquired by a woman without aid from funds from her husband or third party—Devolution—Daughter preferential heir to son.*

Where a woman purchased certain immoveable property and paid the purchase-money by mortgaging the same and subsequently redeemed it:

Held, that the property was acquired by her wits and was her *stridhanam* property and, therefore, devolved on her daughter in preference to her sons. **M.** TADIBOYINA PEDA PUNNAYYA *v.* DEBBAKUTTI KATTAMMA, 17 M. L. T. 363; 28 M. L. J. 495; 2 L. W. 415 **184**

——— ——**Dayabhaga**—*Succession, principle of—Great-grandfather's son's daughter's son and maternal uncle, contest between.*

In a contest between the great-grandfather's son's daughter's son and the maternal uncle regarding succession under the *Dayabhaga* School of Hindu Law, the great-grandfather's son's daughter's son is the preferential heir. **C.** KEDAR NATH *v.* HARIDAS GHOSE, 19 C. W. N 1181 **790**

——— ———**Widow**—*Adoption with consent of reversioner, if invalid for want of authority—Authority, when can be presumed*—Illatom *adoption—Quantum of proof—Charge created by widow—Necessity—Burden of proof—Nature of evidence.*

An adoption made by a Hindu widow with the consent of the nearest reversioner is not bad for want of authority.

In the absence of anything to show that a reversioner was actuated by any representation of a widow that her husband had given her authority to adopt, a Court is entitled to presume that the reversioner, in giving his son to be adopted by the widow, was fully conscious of what he was doing and was mindful of all those considerations which he, as a reversioner, ought to take into account in such circumstances.

The claim that a person has been taken as *illatom* son-in-law must be proved by very reliable evidence.

The onus of proving that a charge created by a Hindu widow is binding on the reversioners lies very heavily upon the persons who claim the benefit of the transaction.

Where the only evidence let in as to the existence of necessity was that a series of documents executed by a widow and an alleged *illatom* son-in-law (which *illatom*, however, was found against) were attested by the reversioners and that the widow had been maintaining in her house a large number of persons related to her but not belonging to her husband's family:

Held, that the evidence was insufficient to prove the existence of necessity and that the onus was not discharged. **M.** PANDA PATYYA *v.* PANDA VENKAMMA, 2 L. W. 455; 17 M. L. T. 393 **54**

——— **Widow**—Res judicata—*Hindu widow, suit by, for maintenance—Subsequent suit by her for residence in family house, whether barred—Evidence Act (I of 1872), s. 115—Estoppel—Subsequent contention negativing a prior one—Estoppel.*

The plaintiff, a Hindu widow, lived outside her husband's house in his life-time and received a maintenance allowance awarded to her under section 488, Criminal Procedure Code. Her husband died in 1897 and in 1898 she took up her residence in one of his houses which was not a family residence. She continued receiving her maintenance allowance from the defendants (heirs of her husband) which was subsequently stopped. In 1908 she filed a suit for maintenance and obtained a decree against the defendants. The defendants filed another suit in 1908 against her for ejectment and obtained a decree, which was confirmed on appeal, ejecting her from the house occupied by her on the ground that she had a right of residence in the family house, but not the house in that suit. Thereupon she brought the present suit to establish her right of residence in the family house which the defendants contended was barred by reason of her prior suit for maintenance wherein no relief for residence had been sought:

Held, that the suit was not barred by her prior suit for maintenance as that maintenance allowance was fixed at a time when she had a residence in one of the defendants' houses and that her subsequent ejectment therefrom gave her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house;

that the defendants having ejected plaintiff from the house she was occupying on the ground that it was not the family residence, were now estopped

from denying her right to a residence in the family house. **S.** LADHIBAI *v.* ISARMAL, 8 S. L. R. 306 **25**

——— **Widow,** *right of, to continue family trade—Debts incurred by her to continue such business - Legal necessity—Reversioner, right of, to question such debts—Minority—Representation as major—Consent by reversioner—Estoppel.*

Where a reversioner himself was a consenting party to a fraud, put forward a minor as a major and on the faith of such representation, induced third parties to enter into a transaction, it is not open to him afterwards to impugn the transaction as invalid and avoid it on the ground that the widow was a minor on the date of the transaction.

Per *Sadasiva Aiyar, J.*—A trade and its good-will are valuable property and when they are inherited by a widow, she has power to manage that particular business as heir in the same manner as she has authority to manage a *zemindari* estate inherited by her from her husband.

Debts incurred on re-drafts to carry on a family business are debts of necessity binding on a reversioner.

Consent by a reversioner to an alienation made by a Hindu widow, by itself makes the transaction valid, and is not merely presumptive and rebuttable evidence of necessity. **M** SOUTH INDIA EXPORT CO., LTD. *v.* T. R SUBBIA, 28 M. L. J. 696; (1915) M. W. N. 488 **957**

——— — — Khojas—Khoja *widow's right to maintenance.*

As in matters of succession and inheritance *khojas* are governed by the the Hindu Law a *khoja* widow is entitled to claim maintenance from the person succeeding to her husband's estate, as this right is an essential part of the Hindu Law of inheritance and succession. **S.** ALLAHRAKHIO *v. Musammat* NANJI, 9 S. L. R. 15 **928**

——— **Will** *executed by widow—Reversioner's suit for declaration, whether maintainable.*

A suit by a reversioner for a declaration that a Will executed by a Hindu widow in respect of her husband's property is void and not binding upon him, is not maintainable, as there is no alienation by the widow. **A.** UMRAO KUNWAR *v.* BADRI, 13 A. L. J. 551 **302**

Hindu Widows' Re-marriage Act (XV of 1856), s. 2 **399**

——— **s. 2**—*Alienation by widow of her deceased husband's property after her re-marriage—Suit by reversioner—Limitation Act (IX of 1908), Sch. I, Arts. 141, 143.*

The re-marriage of a Hindu widow extinguishes her estate in the property of her deceased husband and the presumptive interest of the reversioners vests under section 2 of the Hindu Widows' Re-marriage Act.

A suit by the reversioners to set aside an alienation by the widow of her deceased husband's property brought more than 12 years after her re-marriage is barred under Articles 141, 143 of the first Schedule of the Limitation Act. **N.** NATHU *v.* NAI BAHU, 11 N. L. R. 86 **612**

Homestead land, *recovery of possession of—Landlord, dispossession by—Occupancy* raiyat—*Bengal Tenancy Act (VIII of* 1885), *s.* 182, *Sch. III, Art.* 3—*Limitation.*

Where the plaintiff bought only the house and the homestead land of a person (who had a *raiyati* holding and some homestead land and house in a certain village) and the plaintiff was dispossessed by the landlord, who claimed the house through some other tenant, and the plaintiff sued to recover possession of the homestead land:

Held, that as the plaintiff did not claim to recover possession either as a settled *raiyat* or as an occupancy *raiyat* and did not occupy the disputed plot of homestead land for 12 years and the land was not alleged to be the subject of an occupancy right transferable by custom, the two years' rule of limitation laid down in Article 3, Schedule III, of the Bengal Tenancy Act was not applicable. **C.** ABDULLA *v.* KUTBAN, 21 C. L. J. 473 **859**

Hundi not paid at maturity—Interest—Trade usage **340**

Illatom adoption. *See* HINDU LAW.

Immoveable property—Standing timber **16**

Impartible estate. *See* HINDU LAW.

Improvement. *See* COMPENSATION.

——— ———Grove **410**

——— ———Grove, if constitutes improvement **560**

Inam land—*Presumption as to whether land or land revenue is granted, applicability of, to Civil Courts.*

It is not the Revenue Courts alone but the Civil Courts should also presume that an *inam* grant is of land revenue only and not of land, until the contrary is proved. **M.** GOVINDA REDDI *v.* RAVI KESAVAL NAIDU **1003**

Indemnity bond. *See* RAILWAY.

Inherent power of Court—Abuse of Court's process—Court, power of **580**

Inheritance. *See* BURMESE BUDDHIST LAW; CUSTOM.

Injunction. *See* INTERLOCUTORY INJUNCTION.

— —, grant of—Circumstances **248**

Insolvency—*Insolvency Act*, 1848, 11 *&* 12 *Vict. C.* 21, *ss.* 26, 86, 7, 21—*After-acquired property of insolvent, vesting of, in Official Assignee—Possession of insolvent for over* 12 *years, if adverse against Official Assignee—Limitation Act (IX of* 1908), *applicability of, to proceedings in insolvency—Claims relating to properties in hands of insolvent and his representatives—Jurisdiction of Court to decide on application.*

One *B* was adjudicated an insolvent in 1890 and he died in July 1913 and his sons and widow were found to be in possession of a house and considerable moveable property. The house was purchased in the year 1894 in the name of his mother who died in 1897 and after her death the registry of the house was transferred in the name of his wife. The Official Assignee claimed all the said property as the self-acquired property of the insolvent and made an application under section 26 of the Insolvency Act of 1848 for a declaration accordingly and for possession thereof. The sons and the widow of the insolvent pleaded, among other things, that the claim of the Official Assignee was barred by limitation and that the Insolvent Commissioner had no jurisdiction to try the claim on an application, but the Commissioner referred the Official Assignee to a regular suit only in regard to moveables and tried the claim as to the house:

Held, that the Insolvent Commissioner had jurisdiction to adjudicate the claim on an application as that was the only and proper procedure to be followed.

Held, further, that the after-acquired property of the insolvent vested from the date of its acquisition in the Official Assignee and it was not necessary to have a judgment entered up under section 86 of the Insolvency Act of 1848; and

that the claim of the Official Assignee was not barred by adverse possession.

Per *Sadasiva Aiyar, J.*—When jurisdiction is given by Statute to a Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be filed in another Court or in the same Court in its ordinary original civil jurisdiction, the special procedure pointed by the legislature in respect of the decision of those particular questions ought to be brought to their natural and intended conclusion by the Court which is directed to try those questions and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs.

An insolvent, from the time of his adjudication as insolvent until his final discharge, by the force of the statutory provisions of the Insolvency Act, holds the position of an express trustee for his creditors and he cannot plead adverse possession against the Official Assignee.

Per *Napier, J.*—The Limitation Act has no application to the case. It provides periods with reference to suits, appeals and applications, the last being matters arising out of suits, and under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court and the High Court has no jurisdiction to entertain any suit by the Official Assignee against the insolvent in the exercise of its original civil jurisdiction.

Quære:—Whether the doctrine of agency can be applied as between the Official Assignee and the insolvent though it may be resorted to in regard to the relations between the insolvent and third parties? **M** RATNA BAI *v.* OFFICIAL ASSIGNEE, 17 M. L. T. 347 **168**

Insolvency Act (11 & 12 Vic., c. 21), ss. 7, 21 **168**

——— ——— ——— **s. 46,** *scope of—Leave to appeal—Concurrent jurisdiction of High Court with District Judge District Judge refusing leave to appeal—High Court, power of, to grant leave to appeal.*

A High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under section 46 of the Insolvency Act and if the District Judge refuses leave to appeal, the High Court is not debarred from granting it. **C.** MADHU SUDAN PAL *v.* PARBATI SUNDARI DASSYA, 19 C. W. N. 760 **406**

——— ——— ——— **s. 86** **168**

Interest—Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent **386**

——— Compound interest, stipulation of, when a penalty **843**

——— Deposit of mortgage amount, when valid —Interest, when ceases to run **145**

——— Hundi *not paid at maturity—Trade usage —Creditor, whether entitled to appropriate payment towards interest.*

It was proved as a well-recognised rule in the city of Rawalpindi that if interest was charged on a *hundi* and such *hundi* was not paid at maturity the same rate of interest continued to be payable:

Held, that plaintiffs were entitled to appropriate all payments made by the defendants towards the interest, whenever the amount of such interest due at the time of any payment absorbed the sum paid. **P.** KHIALIA SHAH *v.* HANSARI MAL-NATHU MAL, 24 P. R. 1915 **346**

——— , *payment of, when saves bar of limitation—Evidence to prove such payment* — Pattis *Debtor —Party to such arrangement—Limitation Act (IX of 1908), s. 19—Contract of guarantee—Consideration—Actual release of claim necessary and not mere promise.*

A creditor cannot by a mere unilateral act of payment of interest by the debtor save the bar of limitation.

Where an agreement between a debtor and the creditor, that a credit in the latter's book of a certain amount in favour of the former should be treated as "payment of interest" by the debtor, is relied on to save the bar of limitation, the evidence must show that the debtor was a party to the arrangement and the accounts charging interest sent to the debtor from time to time were accepted by him.

The release of a claim against one person is a consideration for guarantee of payment by another only when that claim is given up, and not when there is a mere promise. **M.** NAGAPPA CHETTY *v.* RAMANATHAN CHETTY **422**

Interlocutory injunction — *Holding of market—Principle to be followed k quitable grounds —Discretion of Court—No general rule—Substantial question to be investigated—Balance of convenience—Delay without satisfactory reason—Court's duty.*

The only thing to be considered by the Court in cases of interlocutory injunctions in aid of the legal right is, if the case is so clear and free from objection on equitable grounds that it should interfere without waiting for the legal right to be established. No general rule can be laid down on the subject by which the discretion of the Court should in all cases be regulated. It is quite sufficient if the Court finds a case showing that there is a substantial question to be investigated and that matters should be preserved in *status quo* until the final disposal of that question.

Where the plaintiff fails to prove that the damage he might sustain if the injunction is refused and he should ultimately turn out to be right, is likely to be greater than the damage which the defendants would suffer if the injunction were granted and they should finally turn out to be right, the balance of convenience is against the grant of an injunction.

A plaintiff making considerable delay without sufficient reason is not to be assisted at the expense of the defendant. **C.** KRISHNA CHANDRA SAHA SARDAR *v.* HEM CHANDRA RAI, 21 C. L. J. 469 **855**

Interpretation — Special and general provisions **331**

——— ——— **of deed** **167**

——— ——— **of Statute** **272**

——— ——— **of wajib-ul-arz** **710**

Irregularity—*Admission of evidence, when writing judgment—Charge of theft, assertion of right in answer to*—Bona fides, *how negatived.*

A Magistrate cannot, after a trial is closed and while he is writing his judgment, admit in evidence a document without giving the accused an opportunity of raising objections to its relevancy or admissibility.

There cannot be a *bona fide* assertion of right in answer to a charge of theft when the accused knew that he had no possession of the property and gathered a produce grown by the complainant thereon. **M.** VAYALAPPRA KELAPPAN NAIR, *In re*, 16 CR. L. J. 458 **90**

——— ——— Sessions Judge dismissing appeal on reasons given in a theft case—Offence under section 430, Penal Code **670**

Issues—Fraud, plea of—Allegations, mere, not sufficient **482**

——— New issue framed at close of case—Evidence, fresh, production of, right of **1**

——— , *new, raising of, in Appellate Court*—De facto *landlord, possession as—True owner, suit brought by, for ejectment—Encroachment of land by tenant - Presumption.*

It is always dangerous to allow a new issue to be raised at the appellate stage.

Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner.

Where a tenant of *A* encroaches on the adjoining land of *B*, as between *A* and his tenant, there is a presumption that the encroachment enures to *A*'s benefit, and becomes an accretion to the tenant's holding under *A*.

A tenant will ordinarily hold the land upon which he has encroached as tenant of his landlord and in that case the landlord may perhaps be described as his *de facto* landlord.

But that would not prevent the true owner of the land encroached upon from bringing a suit for the purpose of recovering his possession. **C.** TEPU MUHAMMAD *v.* TEFAYIT MAHAMMAD, 19 C. W. N. 772 **216**

Joint family. *See* ALAYASANTHANA LAW; HINDU LAW.

Judgment — Personal inspection by Judge, finding based on—Judgment, if valid **60**

Jurisdiction *See* CRIMINAL PROCEDURE CODE, ss. 145, 179, 423 (1)

——— ——— Charge of criminal breach of trust —Special and general provisions—Interpretation **331**

——— ——— , *consent of parties whether can give where Court has none—Arbitration—Award—Decree in terms of award—Both parties consenting to appeal being heard against such decree, effect of.*

A decree passed in the terms of an award not being appealable, the parties to the decree cannot, by giving consent to an appeal being heard and the case being decided again on the merits, give the Appellate

Jurisdiction—contd.

Court jurisdiction to entertain an appeal against such decree. **A.** RAM HARAKH PATHAK *v.* RAM SARAN PATHAK **408**

———*District Judge, power of, to transfer particular case to Additional Judge—Bengal, N.-W. P and Assam Civil Courts Act (XII of 1887), s. 8, sub-sec. (2)—Letters of Administration.*

Under section 8, sub-section (2) of the Bengal, N.-W. P. and Assam Civil Courts Act it is competent to a District Judge to transfer a particular case to an Additional Judge. **C.** RUP KESHWAR LAL *v.* JAIJAI BIBI, 21 C. L. J. 437; 19 C. W. N. 791; 42 C. 842 **935**

——— ———Criminal Procedure Code (Act V of 1898), ss. 195, 467, 471—Execution proceeding—Sanction to prosecute for offences—Appeal to District Judge **540**

——— ———*Ex parte* decree against some of the defendants—Appeal by others—High Court, power of, to entertain application to set aside *ex parte* decree **458**

——— ——— ———*Foreign Court—Submission to its jurisdiction—Objection taken in Court of first instance but not persisted on in Appellate Court—Inference—Question, whether can be re-opened afterwards.*

The fact that an objection to the jurisdiction of a foreign Court was taken in the Court of first instance in the foreign territory but was not persisted on in appeal, is a clear proof of a submission to jurisdiction of the foreign Court and, therefore, the question cannot be re-opened again in execution of that decree in the British Courts. **M.** PATINJARA MANAKAL PARAMESHWARAN *v.* SUBRAMANIA PATTAR **456**

———— ————Imperfect partition — Proprietary title—Civil Court **222**

——— ——— ———Magistrate directing Police inquiry—Charge sheet preferred before another Magistrate **98**

——— ——— ———Mutual, open and current account explained—Defendant residing outside original jurisdiction—Accounts submitted within jurisdiction of High Court **462**

——— ———Provincial Small Cause Courts Act (IX of 1887), s. 25—No objection taken before lower Court—High Court, discretion of, to interfere **567**

——— ——— ———, objection as to, when taken **768**

——— ———Occupancy holding—Suit for declaration of title between rival tenants—Landlord not party to suit—Civil or Revenue Court **568**

———— ——Power of Assistant Collector to order prosecution—Civil Procedure Code (Act V of 1908), s. 70—Local Government Rules under section 70, rr. 30, 31, 32—Execution—Penal Code (Act XLV of 1860), s. 182 **89**

——— ——— ——Practice — Criminal proceedings—Application for special leave to appeal—Staying execution of sentence of death **334**

———— ———Proceedings submitted to Sub-Divisional Magistrate—Power to acquit **663**

——— ———— ———Resumption, suit for — *Muafidar* pleading proprietary title—Decision—Appeal **484**

——— ———Revenue Court's duty as to fair rent—Suits in Civil Court, bar of—Revenue and Civil Courts, jurisdiction of—No forfeiture for mistake in selecting one Court for another **122**

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——— ——— ———Subordinate Judge empowered to entertain appeals—Sanction for prosecution given by lower Court—Subordinate Judge, whether can revoke **71**

——— ——— ———Suit for compensation **245**

——— ——— ———Suit for contribution **247**

——— ——— ———Trade-mark, infringement of—Advertisement—Publication of advertisements—Cause of action **987**

——— ——— **of Court**—Waiver—Consent **796**

——— ——— **of Civil Courts**—Upper Burma Land and Revenue Regulation, s. 53 (2) (*ii*), whether *ultra vires*—Suit regarding State lands between private individuals **736**

——— ——— **of Civil or Revenue Court**—Litigation between private persons—Eviction of a squatter by a squatter or of a sub-lessee by a lessee—Encroachment by lessee, whether can enure for benefit of lessor **872**

———————*Suit for joint possession—Shamilat land*—Muafi—Ala lambardar—*Occupancy rights not in question—Pleadings—Adverse possession and tenancy inconsistent.*

A suit for joint possession of *shamilat* land made over to the defendant as *ala lambardar* and in *muafi*, the *ala lambardari* and *muafi* having come to an end without touching the question of defendant's title to occupancy rights, is cognisable by the Civil Courts.

All questions of title to occupancy rights in the land are quite outside the case so framed.

A man cannot be allowed to plead in the same case that he is an owner by adverse possession against a plaintiff and that he is a tenant by contract under that plaintiff. **P.** SHAMIR KHAN *v.* GHULAM FATIMA, 44 P. R. 1915; 100 P. W. R. 1915 **655**

Jury, verdict of, when can be set aside **72**

Kabuliyat, construction of **807**

Kayam patta. *See* GRANT.

Khorposhdar, interest of, limited—Leases, liability to pay rent under—Sub-soil rights—*Khorposh* grants, heritable, when determinable **429**

Khojas. *See* HINDU LAW.

Lambardar collecting rent—Right to eject **569**

——— ———, power of, to eject **35**

——— ———, right of, to eject *qua lambardar* **297**

Land acquisition—*Land acquired by Government—Apportionment of compensation amount between landlord and tenant*—Muchilika *by tenant before Madras Estates Land Act giving up claim to compensation, effect of—Madras Estates Land Act (I of 1908), s. 6 (1).*

A *ryot* in occupation of "*ryoti* land" on the date the Estates Land Act came into force can also claim compensation in respect of the occupancy right conferred upon him by section 6 (1) of the Act when that land is acquired by Government under the Land Acquisition Act. A *muchilika* executed by a tenant prior to Madras Estates Land Act, relinquishing his claim for compensation, does not estop him from

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making the claim in view of the new right conferred upon him by the passing of the Estates Act.

Where there are distinct interests in the land, compensation awarded must be for both and not in respect of one alone. **M.** HOTHA VIRABHADRAYYA *v.* REVENUE DIVISIONAL OFFICER **8**

Landlord and tenant—*Forcible dispossession—Subsequent re-entry by tenant—Effect of dispossession on tenant's estate—Madras Regulation XXV of* 1802, *s* 4—*'Small quit-rent', meaning of—Permanent Settlement*—Sanad, *construction of—Lessor and lessee—Forfeiture, if incurred by lessee describing his holding as independent and permanent at a fixed rent– Resumption, when permissible—Service, whether includes attendance on ceremonial and indefinite occasions.*

Where a *zemindar* wages war against his feudatory and forcibly seizes his estate, but, later on a descendant of the said feudatory gets back possession of the same, the intermediate possession of the *zemindar* does not affect the right of the feudatory and change the character of the tenure.

Where a *sanad* which was granted to a *zemindar* at the time of the Permanent Settlement contained the following clause: "Alienated lands, paying a small quit-rent, which quit-rent, unchangeable by you, is included in the assets of your *zemindari*"; and where it was contended that under the above clause the *zemindar* was not entitled to enhance the rent of under-tenures granted by the *zemindar* prior to the said Permanent Settlement:

Held, that the words 'small quit-rent' in the above clause, which corresponded to section 4 of the Madras Regulation XXV of 1802, meant a favourable rent; that only permanent grants should be understood as coming within the mischief of the word 'alienated' therein; that there was no warrant in authority or practice for applying it to mere temporary leases, not understood by parties to be permanent, however long their currency might be; and that the clause in question prohibited only enhancements imposed by the *zemindar* and not those to which the lessee consented.

A lessee does not repudiate the title of his landlord and incur forfeiture by describing his holding as independent and permanent at a fixed rent.

A resumption of an estate is permitted to a *zemindar* only when the estate has been included in the assets of his *zemindari* at the Permanent Settlement and the grant is for service in lieu of wages (in which case the right of resumption is absolute), or is burdened with service (in which case the right can be exercised only if the grantee is unwilling to perform the service, even though the same might be obsolete or unnecessary).

Where the obligations on the part of a tenant, the non-performance of which was alleged to give rise to the exercise of the right of resumption by the *zemindar*, were to attend (1) with 500 *paiks* at Dusserah, the occasion of the annual festival and Durbar and (2) whenever such attendance was directed, when the tenant went on Sircar business:

Held, that the attendance required was on indefinite and ceremonial occasions and could not be deemed a condition of the holding, that it was at the most analogous to that of copy-holders in England to do

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suit in the Court of their manor and that the default in question did not entail a forfeiture of the holding.

No forfeiture is incurred unless there is non-performance on the part of the tenant of a subsisting obligation for service and that service is connected with his title. **M.** MAHARAJA OF JEYPORE *v.* RUKMINI PATTAMHADEVI, 2 L. W. 483; (1915) M. W. N. 346 **365**

——— *Jungly and uncultivated land—Presumption—Limitation Act* (*IX of* 1908), *s.* 22, *applicability of.*

Where the land in a *zemindari* is waste land and uncultivated, the presumption is that the *zemindar* is the owner of both *melvaram* and *kudivaram* rights. In such a case the burden is on the *ryot* to show that he owns the *kudivaram* interest.

Per *Seshagiri Aiyar, J.*—Section 22 of the Limitation Act applies only to cases where the added or substituted plaintiff wants to litigate a right for himself independently of the right of the original plaintiff. Where, therefore, a plaintiff is added in consequence of the assignment of the rights of the original plaintiff, his right to a decree is not affected by section 22 of the Limitation Act. **M.** ARUNACHELLA AMBALAN *v.* R. G. ORR **634**

——— *Possession by tenant of* parti *land for tying cattle and other agricultural purposes—Presumption—Adverse possession, question of, if arises.*

Where a tenant is in possession of a *parti* land at a short distance from the site of his house for the purposes of keeping his cattle troughs, cattle-shed and sugar-cane press, the presumption is that the land was given to him for purposes anciliary to agriculture, and if he builds a house on the land for the stalling of cattle and storing of the implements of husbandry, the *zemindar* cannot get the house demolished so long as he remains a tenant.

No question of adverse possession arises in such a case. **A.** PADARATH TEWARI *v.* BAZ SINGH **264**

——— *Sale of holding for arrears of rent—Merger of occupancy rights—Notice to quit, effect of.*

Where a *raiyat* under the landlord mortgaged the property to a third person, who got possession and inducted the present defendants on the land, and the landlord brought a suit for rent against the heirs of the *raiyat* and bought up the holding at a sale for arrears of rent:

Held, that the occupancy holding still continued to exist even after the purchase by the landlord.

Where the landlord sold, thereafter, the permanent *raiyati* right to another who also took a lease from the landlord and then sold it to the plaintiff, who intending to eject the defendant served him with notice:

Held, that the defendant, having been duly served with notice to quit, must be ejected. **C.** EAKUF ALI *v.* MEAJAN **686**

——— *Suit for arrears of rent—Previous decree, whether proves landlord's title—Presumption as to continuance of relationship—Evidence Act* (*I of* 1872), *s.* 114, *ill.* (d).

In a suit for arrears of rent a decree for rent obtained by the landlord in a prior suit against the

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same defendants is not merely an item of evidence, but is conclusive as to the relationship between the parties at the time to which the previous suit referred.

Section 114, illustration (*d*) of the Evidence Act does not compel, but certainly permits, the Court to make a presumption as to the continuance of the state of things. **C.** HIRANMOY KUMAR SAHA *v.* RAMJAN ALI DEWAN **694**

——— ——— ——— ——— *Tanks in villages, ownership in—Presumption—Entry in papers on basis of possession—Evidence of permission to make tanks—Burden of proof.*

There is no persumption of law or custom that the ownership in the tanks situate in a village vests in the *zemindar*. They belong to the proprietor if he has made them, or to the tenant if he has made them. Entry in the papers must be made on the basis of possession and a tenant should not be asked to give in every case evidence of the *zemindar's* permission to make it. **U. P. B. R.** GAURI SHANKAR *v.* AMBIKA PRASAD **11**

Lease *of house at Mussoorie for "season", when terminates.*

In the absence of evidence to the contrary a lease of a house at Mussoorie for the 'season' continues to the end of the year. **A.** OLD, F. S. *v.* SHAIL J. A., 13 A. L. J. 647 **437**

——— *Evidence, documentary and oral, admissibility of—"Putra poutradhi kramay", meaning of—Lease, perpetual—Tenancy, proof of.*

Where there is a document as evidence of the transaction of a lease, oral evidence in the shape of admission relating to the transaction of the lease is not admissible.

It is not sufficient, to prove the plaintiff's tenancy, to show that he was in possession of other lands covered by the lease.

The expression "*putra poutradhi kramay*" in a document signifies that the lease is a perpetual one. **C.** KARTIC MANDAL *v.* BAMA CHARAN MANDAL **502**

———, liability to pay rent under- Sub-soil rights —*Khorposh* grants, heritable, when determinable— Title-deed, forged, effect of **429**

Leave to appeal—Concurrent jurisdiction of High Court with District Judge—District Judge refusing leave to appeal—High Court, power of, to grant leave to appeal **405**

Leave to appeal to Privy Council—Letters Patent (Mad.), cls. 10, 39—Orders in exercise of disciplinary jurisdiction—Leave to appeal to Privy Council, whether to be granted **879**

Legal necessity. *See* ALIENATION; HINDU LAW.

——— ——— — Payment of Government demands **181**

Legal Practitioners Act (XVIII of 1879), ss 27, 28—*Legal Practitioner, fees recoverable by, from his own client—Suit for remuneration for work done Discretion of trying Court not to be interfered with—"Costs of suit," meaning of—Limitation Act (IX of 1908), Sch. I, Art. 84.*

The Legal Practitioners Act does not impose any limitation upon the fees which are recoverable by practitioners from their own clients.

Section 27 of the Act refers only to the fee which is to be paid to the adversary Pleader.

Where the fees are not settled before hand, and the suit is one for remuneration for work done, the Court in assessing the amount, performs the functions of the Taxing Officer in England and when he assesses the remuneration at a certain amount, having regard to the local conditions and the nature and responsibility of the work done by the Pleader, an Appellate Court should be very slow to interfere with his discretion.

Such a suit is governed by Article 84, Schedule I of the Limitation Act (IX of 1908). The word "costs" in that Article is not confined to "out of pocket expenses alone" of the Practitioner but includes also the remuneration payable to him. **M.** MAHARAJAH OF VIZIANAGARAM *v.* NARASINGA RAO **763**

——— ——— ——— **s. 28** **763**

——— ——— ——— ——— ——— **s. 28,** *scope of—Agreement with client for fees—Amount of fees and manner of payment—Reasonable remuneration, implied promise of—Suit maintainable.*

Where a party employs a Pleader without any agreement as to the amount of fees or the manner of payment thereof, the Pleader is entitled to recover on an implied promise of reasonable remuneration, and his suit to recover a reasonable sum as his remuneration is not touched by the principle embodied in section 28 of the Legal Practitioners Act.

In the absence of an agreement a Pleader is entitled to a *quantum meruit*, which ought to be determined with reference to all the circumstances of the case. **C.** SIB KISHORE GHOSH *v.* MANIK CHANDRA NATH, 21 C. L. J. 618 **453**

Lessor and lessee—Forfeiture, if incurred by lessee describing his holding as independent and permanent at a fixed rent—Resumption, when permissible—Service, whether includes attendance on ceremonial and indefinite occasions **365**

Letters Patent (Mad.), cls 10, 39—*Orders in exercise of disciplinary jurisdiction—Leave to appeal to Privy Council, whether to be granted.*

Orders passed in proceedings in exercise of the disciplinary jurisdiction of the High Court under section 10 of the Letters Patent are not appealable under clause 39 of the Letters Patent and no special leave to appeal to the Privy Council can be granted. **M.** A VAKIL OF HIGH COURT *v.* PRESIDENT OF VAKILS' ASSOCIATION, 29 M. L. J. 16 **879**

——— ——— ——— **cl. 15**—*Criminal trial—Revision—Appeal, if competent.*

An order passed by a single Judge of the High Court in the exercise of its criminal revisional jurisdiction is one passed in a criminal trial if the proceedings which gave rise to the revision were a criminal trial, and no appeal lies under clause 15 of the Letters Patent against such an order. **M.** ADAPALA VENKATA NARASA, *In re*, 2 L. W. 363; 16 CR. L. J. 464 **96**

Letters Patent (Mad.)—concld.

——————— **s. 15** — *High Courts Act* (24 & 25 *Vic*, *C.* 104), *s.* 13—*High Court exercising jurisdiction under s.* 25 *of Provincial Small Cause Courts Act* (*IX of* 1887)—"*Appellate jurisdiction*"—*Judgment Appeal against such order, if maintainable—Discretionary power given to Subordinate Courts — Appellate Court, power of, to interfere.*

A single Judge of the High Court, when disposing of an application to exercise the High Court's revisional jurisdiction over a subordinate Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887), exercises "appellate jurisdiction" within the meaning of section 13 of the High Courts Act and his order is a judgment even when the Judge merely declines to interfere in revision, and it is immaterial whether before such refusal the records were called for or notice issued to the other side, and an appeal lies from such an order under section 15 of the Letters Patent.

In matters of discretion the Court will not ordinarily interfere in appeal, though it has jurisdiction to do so. **M.** SRINIVASA IYENGAR *v.* RAMASWAMI CHETTIAR, 29 M. L. J. 12; 18 M. L. T. 46 **846**

——————— **cl. 39** **879**

Lien. *See* TRANSFER OF PROPERTY ACT, 1882, s. 53.

——— *Contract Act* (*IX of* 1872), *ss.* 171, 217, 221—*Barrister—Equitable lien—Money paid into Court—Protest, nature of.*

In satisfaction of a decree a large sum was paid into Court, through a Barrister, under protest saying that owing to a mistake in the decree more money was deposited than was actually due under it. This sum was afterwards attached in execution of another decree against the judgment-debtor in the first decree. The Barrister claimed a lien over portion of the sum deposited:

Held, that the Barrister had no lien against the sum under sections 171, 217 and 221, of the Contract Act;

that the rule of Solicitor's equitable lien in England did not apply to the case, the Barrister having obtained no decree in favour of his client, and there being not fruits to obtain a lien on;

that as the Barrister had parted with the possession of the money without making any reference to his lien for fees, the amount of fees could not be regarded as having been paid in under protest. **L B.** ROBERTSON *v.* KO CHEIK, 8 S. L. R. 70 **870**

Limitation—*Appeal filed with delay - Sufficient cause—Objection by respondent at hearing — Companies Act* (*VI of* 1882), *s.* 169—*Appeal—Notice to respondent—Limitation period, expiring during vacation—Extension of limitation period—Right of Official Liquidator to recover by summary process from creditor of Bank who realized his debt by suit before passing of winding-up order and after suspension of payment by Bank—Companies Act* (*VII of* 1913), *s.* 284.

The period of three weeks prescribed by section 169 of the Companies Act may be extended by Appellate Court, when it is satisfied that the appellant showed due diligence but failed on account of circumstances beyond his control, such as the Court being closed on account of the vacations.

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No extension can be claimed on the ground that the Pleader for the appellant wrongly believed that section 284 of the Companies Act, 1913, was applicable to the case, for the section clearly lays down that Act of 1882 applied to cases in which proceedings were pending when the Act of 1913 came into force.

A respondent is entitled to contest an *ex parte* order extending the period of three weeks prescribed by section 169 of the Companies Act, 1882.

An Official Liquidator is not entitled by summary order to a refund of money realized by a creditor of the Bank before the order of winding-up was passed but after the Bank had passed a resolution stopping payment of debts. The Liquidator has to file a regular suit like other claimants to recover the amount realized by such creditor of the Bank. **P.** TARA CHAND *v.* OFFICIAL LIQUIDATORS, PEOPLE'S BANK OF INDIA, LTD., 90 P. L. R. 1915; 46 P. R. 1915; 71 P. W. R. 1915 **265**

——— — Instalments, recovery of—Mistake **399**

———————*Pre-emption—Starting point of prescribed period—Land in possession of vendee at date of sale —Mutation of names.*

The vendor in 1906 sold three fields by three sale-deeds, by transferring each one-third share out of each of the three fields to vendees who were father and son. Two of the fields were at the date of sale in the possession of the father vendee under a mortgage and the third he cultivated as a *tenant* before 1906 and in 1907-08 and in subsequent years. In 1906 the mutation was refused on the ground that the vendor had not transferred possession to the vendees. Subsequently mutation having been sanctioned in 1912 the plaintiffs brought the present suit for pre-emption:

Held, that since the vendees did not take possession of any portion of the land *under the sale* the period of limitation for the suit commenced from the date of mutation.

The taking of possession under a sale is an overt act fixed as the terminus *a quo* for limitation because it constitutes a publication of the transfer. **P.** IMAM-UD-DIN *v.* KHUDA BAKHSH, 88 P. L. R. 1915; 63 P. W. R. 1915 **146**

———————*Suit or proceeding, limitation applicable to.*

The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. **C.** RISWESSOR SEN *v.* IMAMUDDI **833**

——— — Time within which proceedings under section 476, Criminal Procedure Code, should be taken **97**

Limitation Act (IX of 1871), s. 10 **292**

Limitation Act (XV of 1877), Sch. II, Art. 134 **337**

Limitation Act (IX of 1908), applicability of, to proceedings in insolvency **168**

——————————— **s. 4** **449**

——————————— **s. 10** **292**

——————————— **s. 12** **680**

——————————— **s. 12 (2)** — *Appeal—Exclusion of time requisite for obtaining copies.*

The judgment of the first Court was delivered on the 15th May, and the decree was signed late on

Limitation Act—(1908)—contd.

that day. The Courts were closed, except for copying purposes, from the 16th May to the 15th June, inclusive. The defendant applied for copy on the 16th June, received it on the 18th, and filed the appeal to the District Judge on the 19th *idem*:

Held, that the appeal was within time. **N.** KASHIBAI *v.* KANNOO, 11 N. L. R. 104 **833**

——— ——— ——— **s. 12 (4)**—*Suit to set aside award—Application for copy—Time requisite for obtaining it, whether deducted.*

In an application to set aside an award filed in Court the time requisite for obtaining a copy of the award may be taken into account under section 12 (4) of the Limitation Act in calculating the period of limitation provided the attention of the Court is drawn to this. **M.** SUBRAMANIA AIYAR *v.* POOPPARAM LALA **860**

——— ——— ——— **s. 19** **422**

——— ——— ——— **s. 19**—*Acknowledgment of debt—Partnership firm—Receiver, acknowledgment by, how far affords starting date for fresh period of limitation.*

The acknowledgment of a debt of a partnership firm by its Receiver, appointed for collecting its outstandings and doing all things necessary for the realization and preservation of its assets, does not afford a fresh start for limitation, as it does not come within the power to collect outstandings or to realize assets; it may have been otherwise if the powers of managing the partnership business had been conferred on the Receiver.

Payment of interest and giving of acknowledgment of a debt are two different things. **L. B.** S. M. A. CHETTY *v.* M. L. R. M. A. CHETTY **27**

——— ——— ——— **s. 19**—*Promise to pay amount due—Acknowledgment of liability—Appellate Court, powers of, to decide points of limitation.*

An Appellate Court can decide questions of limitation, if no further facts than those before it, are necessary for that purpose.

A promise to remit money due under a particular document is "an acknowledgment" within the meaning of section 19 of the Limitation Act, sufficient to save limitation. **M** RAMASWAMI PATTER *v.* TIRUCHA MANNADIAR **36**

——— ——— ——— **s. 22** **634**

——— ——— ——— **s. 23** **385**

——— ——— ——— **s. 25**—*Instalment bond—Hindi date mentioned in bond—True test as to when limitation begins to run.*

A mortgage bond executed on the 24th of July 1892 provided that the money due under it should be paid in eight yearly instalments. Each instalment had to be paid on *Magh Sudi Puranmashi* of each year. The last payment was to be made on *Magh Sudi Puranmashi*, 1956 corresponding to 14th of February 1900:

Held, that a suit on the bond brought on the 19th of July 1912 was barred by limitation and that section 25 of the Limitation Act did not apply to the case.

The true test in a case of this kind is on what date was the plaintiff entitled to demand his money, if payment was not made of any instalment fixed in the bond. **A.** DWARKA PRASAD *v.* RAJA RAM, 13 A. L. J. 486 **980**

Limitation Act—(1908)—contd.

——— ——— ——— **s. 29** **797**

——— ——— ——— **s. 30** **337**

——— ——— ——— **s. 31 (2)** **605**

——— ——— ——— **s. 91** **199**

——— ——— ——— **s. 148** **403**

——— ——— **Sch. I, art. 11** **731**

——— ——— ——— **art. 12** **314**

——— ——— ——— **art. 14** **490**

——— ——— ——— **arts. 44, 91**—*Hindu Law—Joint family—Alienation of joint family property—Suit by minor member after attaining majority against vendee for possession of his share in immoveable property—Limitation.*

The plaintiff's brothers during his minority sold the joint family land to the defendant including the share of the plaintiff. After expiry of three years from the date of plaintiff's attaining majority he sued for his share of the land. The suit was dismissed as barred by limitation under Article 44 of the Limitation Act. On second appeal it was contended for the respondents that the suit was rightly dismissed and that it was in any case barred under Article 91:

Held, that the suit was not barred, that neither Article 44 nor 91 was applicable to the case and that the plaintiff had 12 years to sue for possession of the land.

That the sale must be regarded as one made by the adult members of the family on behalf of the entire co-parcenary body including themselves and their youngest brother. The alienation could not be viewed as one made on behalf of the minor by his guardian to make Article 44 applicable, for a minor's undivided share in joint family estate is not property which can be dealt with by his guardian.

That Article 91 is not intended to apply to suits for possession of immoveable property alienated by managers of joint families and endowments or by Hindu widows or other persons whose powers are restricted. In such cases if the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside. An express prayer in the plaint for the cancellation of such an instrument may be treated as not an essential part of the plaintiff's relief. **P.** RADHU RAM *v.* MOHAN SINGH, 84 P. L. R. 1915; 96 P. W. R. 1915 **199**

——— ——— ——— **arts. 62, 120**—*Debt due to deceased received by one of his heirs—Suit by other heirs to recover their share—Limitation.*

A suit by one of the heirs of a deceased person to recover his share of the debt due to the deceased, which had been realized by another heir holding succession certificate, is governed by Article 62, and not Article 120 of the Limitation Act. **A** ABDUL GAFFAR *v.* NUR JAHAN BEGUM, 13 A. L. J. 686 **347**

——— ——— ——— **art. 62**—*Principal and agent—Receipt of money after termination of agency—Money had and received.*

Where an agent receives money due to the principal after the termination of his agency, a suit to recover the same must be brought within three years from the time of the receipt as money had and received. **A.** HANSRAJ *v.* RATNI, 13 A. L. J. 494 **986**

——— ——— ——— **art. 84** **763**

Limitation Act—(1908)—contd.

——— ——— **Sch. I, arts. 85, 88**—*Mutual, open and current account explained—Defendant residing outside original jurisdiction—Accounts submitted within jurisdiction—Jurisdiction of High Court—Factor, definition of.*

Where under an agreement between the plaintiff and the defendant the defendant submitted to the plaintiff his account in the plaintiff's shop in Madras, the High Court in its original side does not cease to have jurisdiction over the suit merely because the defendant resides in a place outside such jurisdiction.

Different sums were advanced by the plaintiff to the defendant at different times. They were treated under an agreement as a consolidated debt commencing from the date of the agreement and a promissory note was executed by the defendant the same day about the consolidated items. A suit on the basis of the dealings was held to fall under Article 85, Schedule I, Limitation Act, 1908, and not under Article 88.

A factor is an agent entrusted with the possession of goods for sale.

Therefore where in the contract and dealings between the parties something outside the mere entrusting of the goods for sale is found (*e. g.*, advances from time to time by the plaintiff to the defendant and credit for the goods sold on defendant's behalf), these elements are quite sufficient to bring the case under Article 85 for the balance due on a mutual, open and current account, and Article 88 has no application. **M.** Bapu Sahib Yousuff Sahib *v.* Isac Ismail Co., (1915) M. W. N. 519 462

——— ——— ——— **art. 88** 462

——— ——— ——— **art. 89** 748, 848

——— ——— ——— **art. 91** 62

——— ——— ——— **arts. 91, 120**—*Cancellation of document—Limitation, from when begins to run.*

The limitation for a suit for declaration that a mortgage deed executed by the plaintiff was without valid consideration and ineffectual and that the defendant had no right under it, begins to run from the date of the execution of the document. **A.** *Mirza* Qasim Beg *v.* Muhammad Zia Beg, 13 A. L. J. 913 968

——— ——— ——— **arts. 91, 124**—*Suit to recover possession of trust properties—Management of temple transferred under agreement—Agreement found to be void—Suit to recover possession—Suit to set aside agreement, whether to be brought within three years—New issue framed at close of case—Fresh evidence, production of, right of—Expenditure incurred by* de facto *trustee during management, whether ground for retaining possession until payment of expenses.*

The Limitation Act merely prescribes within what periods suits must be brought, and cannot be construed as of itself creating an obligation to sue where none exists.

Sales which are *ab initio* void cannot become valid if not set aside within three years by suit.

A suit to recover possession of a temple from the managers, in whose hands its management was vested under an agreement, is in time if brought within 12 years and more than three years from the date of the agreement, though no suit to set aside the agreement

Limitation Act—(1908)—contd.

was brought under Article 91, Schedule I of the Limitation Act.

Mere permission to raise an issue at a late stage of the case does not imply that the party on whose behalf it is raised is at liberty to let in evidence on issues already closed.

In the case either of public or private charities the Court is not bound to leave the trust estate in possession of a person not entitled to the character of a trustee, merely because he expended money on it while acting as trustee. On the other hand, it is the duty of the Court, especially in the case of public charitable trust to take the trust property out of the possession of persons not entitled to hold it, while making due provision for any claims which they may have in respect of the expenditure incurred in connection therewith.

Where a plea as to improvements is raised merely as a pretext to keep back possession, effect ought not to be given to such plea. The proper course is to direct the defendants trustees to deliver possession, and then direct accounts to be taken as between the *de facto* trustee and the temple in order to ascertain the amount to be allowed to him for expenses incurred by him in the course of such management. **M.** Narayanan Chettiar *v.* Lakshmanan Chettiar, 28 M. L. J. 571 1

——— ——— **Sch. I, art 95** 62

——— ——— ——— **art. 113** 808

——— ——— ——— **art. 116** 797

——— ——— ——— **art. 118** 785

——— ——— ——— **art. 120** 62, 275, 347, 629, 968

——— ——— ——— ——— **arts. 120, 125**—*Custom—Alienation by widow—Occupancy rights, creation of—Suit for declaration that creation of occupancy rights by widow was invalid—Limitation, starting point of.*

Article 125, and not Article 120, of the Limitation Act, applies to a suit for a declaration that a creation of occupancy rights by a widow is invalid as against reversionary rights of the plaintiff and the period of limitation for such a suit begins when occupancy rights are created.

A subsequent and belated objection in partition proceedings as to the partition of the occupancy holding does not give a fresh period of limitation. **P.** Hira *v. Musammat* Ghathu, 115 P. L. R. 1915 789

——— ——— ——— ——— **art. 124** 1

——— ——— ——— ——— **art. 125** 789

——— ——— ——— ——— **art. 127** 183

——— ——— ——— ——— **art. 132** 629

——— ——— ——— ——— ——— **art. 132**—*Suit on mortgage for principal and interest—Mortgagee entitled to sue for arrears of interest—Waiver, omission to sue, whether amounts to.*

A mere omission to sue is not sufficient proof of waiver of the right to sue.

Where a mortgage-bond dated 11th August 1890 provided that the interest on the mortgage-money would be paid yearly and the mortgagee could recover arrears of interest by suit and after 10 years, if the land was not redeemed, he could recover principal and interest by suit and get the land attached and sold in execution, and only a small sum having been paid towards interest in the early years of the mortgage the mortgagee sued the mortgagor:

Limitation Act—(1908)—contd.

Held, that, inasmuch as the plaintiff held the option of suing every year, the suit was governed by Article 132 of the first Schedule of the Limitation Act and the plaintiff could not recover interest that had become due 12 years before the institution of the suit. **P.** JAHAN KHAN *v.* CHANDI SHAH, 122 P. W. R. 1915 **854**

——— **Sch. I, arts. 134, 148**—*Mortgage Mortgagee selling absolute interest in mortgaged property—Redemption—Limitation.*

A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties means act of parties to the mortgage transaction. No assertion of adverse title on the part of a mortgagee during the continuance of a mortgage can set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years.

If a mortgagee sells the mortgaged property out-and-out to a third person, the possession of the vendee does not become adverse against the owner of the equity of redemption from the date of the sale, and a suit for redemption would lie under Article 148 of the Limitation Act. **A.** PANNA LAL *v.* RAMESHAR SAHAI **403**

——— **art. 137** **841**

——— **art. 141**—*Suit by reversioner Alienation by widow of her deceased husband's property.*

A suit by the reversioners to set aside an alienation by the widow of her deceased husband's property brought more than 12 years after her re-marriage is barred under Articles 141, 143 of the first Schedule of the Limitation Act. **N.** NATHU *v.* NAI BAHU, 11 N. L. R. 86 **612**

——— **arts. 142, 144**—*Suit for possession—Plaintiff, what must prove—Adverse possession pleaded—Possession within 12 years, proof of—Defendants' inability to prove possession continuously for 12 years—Presumption—Possession under illegal order, effect of.*

In a suit for possession the plaintiff must prove not only that he is entitled to the property but also (if and in so far as that is contested) that he has not been out of possession during the whole of the 12 years preceding his suit. The facts that the defendants are not able to establish affirmatively that they have been continuously in possession for the said period of 12 years under Article 144 of the Limitation Act does not necessarily entitle the plaintiff to succeed unless the requirements of Article 142 are also satisfied.

In calculating the said period of 12 years, possession under an illegal order should not be taken into account. **M.** KALIAPERUMAL KEERUDAYAN *v.* CHIDAMBARAM THANJIRAN **10**

——— **art. 143** **612**

——— **art. 144** **10, 275, 731, 976**

——— **art. 164** **476, 975**

——— **art. 166** **314**

——— **art. 170** **1003**

——— **art. 178** **49**

——— **art. 182** **237**

Limitation Act—(1908)—concld.

——— **Sch. I, art. 182**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 12—Execution—Inventory of property attached not annexed to application—Application, whether in accordance with law.*

Where a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same, as required by Order XXI, rule 12, of the Code of Civil Procedure, the application is not in accordance with law within the meaning of Article 182 of the Limitation Act, 1908, and cannot save limitation when it is dismissed for non-compliance with an order for amendment. **A.** ABDUL RAFI KHAN *v.* MAULA BAKHSH, 13 A. L. J. 706 **479**

——— **art. 182**—*Limitation, saving of—Application only necessary—Return of application for amendment and failure to re-present, immaterial.*

Article 182 of Schedule I of the Limitation Act only requires that there should be an application. The fact that an application was returned to the decree-holder for amendment and was not re-presented, would not affect limitation. **M.** GURRALA SESHAYYA *v.* YEDIDA VENKATASUBBIAH, 28 M. L. J. 494; 2 L. W. 540 **16**

——— **art. 182 (7)** **274**

——— **art. 183** **237**

Lower Burma Towns and Village Lands Act (IV of 1898), s. 41—*Jurisdiction of Civil or Revenue Court—Litigation between private persons—Eviction of a squatter by a squatter or of a sub-lessee by a lessee—Encroachment by lessee, whether can enure for benefit of lessor.*

Where private persons litigate concerning claims to land not held under grant or lease from Government or under a license from the Revenue Officer, but which is at the disposal of Government, the jurisdiction of the Civil Court is not barred by section 41 (*a*) of the Lower Burma Towns and Village Lands Act.

Under the said Act the eviction of a squatter by another squatter, or of a sub-lessee by a lessee is not a matter that 'is to be determined by the Revenue Authority', and there is nothing in the Act to oust the jurisdiction of the Civil Courts in cases which do not involve the decision of any rights as against Government.

The benefit of an encroachment by a lessee on a neighbour's land enures for the benefit of the lessor.

Though section 108 *B* (*d*) of the Transfer of Property Act is not in force in Wakema, the principle embodied therein should be followed. **L. B.** SIT YIN *v.* MA SHIN, 8 L. B. R. 71 **872**

Lunatic co-parcener, right of, to share on partition. *See* HINDU LAW.

Lurking house trespass. *See* PENAL CODE, s. 456.

Madras Civil Courts Act (III of 1873), s. 8 **71**

Madras Civil Rules of Practice, r. 14 **449**

——— **r. 161A** **119**

Madras Estates Land Act (I of 1908) 601

——— ——— ——— **ss. 3 (5), 77, 194**—*Suit for rent—Tenant disputing title of plaintiff as land-holder—Court, duty of, in such cases—Court, when to decide the question by itself.*

Where a *ryot* disputes the title of the plaintiff to collect rent, no decree can be passed for the rent until that question has been decided in favour of the plaintiff.

Where, in a suit under section 77 of the Madras Estates Land Act for recovery of rent, the tenant disputes the title of the plaintiff as a land-holder and sets up the title of a third person, there are three courses open to a Court, *viz.*, the Court may, by itself, determine who the land-holder is who should collect rent, or it may direct the plaintiff to apply to the Collector to declare him to be the land-holder or may apply section 194 of the Madras Estates Land Act and if it finds there has been no *bona fide* payment of rent to a third person, it may give the tenant the option of paying the same into Court. Where the parties themselves are before the Court, the proper course is for the Court before which the suit is filed to make the inquiry itself. **M.** SONA ALAGA KUDUNBAN *v.* SIVARAMA AIYAR 31

——— ——— ——— **s. 6 (1)** 8

——— ——— ——— **ss. 42 (2), 112,** *applicability of—Survey and Boundaries Act (IV of 1897), s. 20 (3)—Contribution, recovery of*

Section 42 (2) of the Madras Estates Land Act applies to cases in which the area of a holding has been determined under the Survey and Boundaries Act.

Section 112 of the Madras Estates Land Act also applies to proceedings for the recovery of contribution of survey charges apportioned under section 20 of the Survey and Boundaries Act. **M.** BANGARUSAMI REDDI *v.* KUPPANNA GOUNDEN, 28 M. L. J. 377 595

——— ——— ——— **s. 77** 31

——— ——— ——— **s. 112** 595

——— ——— ——— **s. 186**—*Collector's certificate—Objections of petitioner, not illegal—Court not bound to call for evidence.*

A Collector's certificate, granted under section 186 of the Madras Estates Land Act is not conclusive.

An order of a District Court under section 186 of the Madras Estates Land Act, based not merely upon the certificate of the Collector but also upon other materials raised on behalf of the *ryot*, is not illegal.

Quære.—Whether a District Court is bound to call for evidence when none is offered by the *ryot* himself before acting upon the Collector's certificate? **M.** MEENAKSHI AMMAL *v.* ORR, R. G., (1915) M. W. N. 421 457

——— ——— ——— **s. 192**—*Plaint, valid presentation of—Limitation Act (IX of 908), s. 4—Officer authorized to receive plaints absent from head-quarters—Court, whether closed—Madras Civil Rules of Practice, r. 14, applicability of.*

A plaint under the Madras Estates Land Act (I of 1908) presented to the Head Clerk of a Collector is not validly presented, if he is not appointed to receive plaints.

A Court is not closed within the meaning of section 4 of the Limitation Act, if the officer authorized to receive plaints is absent from head-quarters and is in camp.

Rule 14 of the Madras Civil Rules of Practice does not apply to proceedings before a Revenue Court. **M.** RECEIVER OF THE N. AND M. ESTATES *v.* SURAPARAZU, 38 M. 295 449

——— ——— ——— **s. 194** 31

Madras Regulation (XXV of 1802), s. 4 365

Madras Rent Recovery Act (VIII of 1865), s. 11 (3)—*Madras Estates Land Act (I of 1908)—No retrospective effect.*

No retrospective effect should be given either to section 11 (3) of the Madras Rent Recovery Act or to its corresponding provision of the Madras Estates Land Act. **M** ZEMINDAR OF PAMUR TALUQ *v.* MALAKONDAYYA NAIDU 601

——— ——— ——— **s. 12**—*Tenancy from year to year—Oral notice to quit—Wrongful ejectment—Suit for possession—Damages.*

A notice of ejectment under the Madras Rent Recovery Act (VIII of 1865) must be in writing.

Where there was merely an oral notice to quit and the tenant was wrongfully dispossessed the tenancy being from year to year.

Held, that he was entitled to be in possession for a year after the period when he was ejected and was entitled to one year's mesne profits as damages in lieu of possession. **M.** GOTTIMUKKALA CHINA *v.* SRIMAT SURANGAM NALLANI 574

Madras Survey and Boundaries Marks Act (IV of 1897), s. 13—*Adverse possession—Starting point of limitation.*

Where an original order of a Survey Officer, adverse to the plaintiff, was dated 31st October 1908 but both parties' cross-appeals were heard together and disposed of by a single order dated the 18th January 1909:

Held, that the date of the latter order was the starting point of limitation for the plaintiff's suit for possession. **M.** VEERARAGHAVA CHARIAR *v.* KRISHNAMACHARIAR 507

——— ——— ——— **s. 20 (3)** 595

Mahant, *appointment of—Absence of rules and practice prescribed by founder—Custom or usage—Practice—Suit for possession of* math *and its property—Burden of proof—Election—*Dasnam bhik, *election of* mahant *by, when valid.*

In case the founder of a *math* prescribes no rules or practice to be followed in the selection and appointment of the future *mahants*, the selection and appointment of a person to be the *mahant* of the *math* on a vacancy occurring in the *mahantship* must depend on the custom or usage and the practices which have prevailed in the appointment of *mahants* of that *math*.

The plaintiff sued the defendant for the possession of a temple and the properties appertaining to it alleging that he was the only *sadhak* (disciple) of the deceased *mahant* and that he was duly elected *mahant* and was appointed with the usual ceremonies. The defendant who was the general attorney and storekeeper of the deceased *mahant* also claimed to have been duly elected *mahant* in succession to the

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deceased *mahant* and was in possession of the temple and of the property appertaining to it:

Held, that it was for the plaintiff to prove his right to the *mahantship* which, if proved, would carry with it the right to possession of the temple and of the property appertaining thereto, and that as the plaintiff failed to prove that he was the duly elected *mahant* of the *math*, his suit would fail and it would be immaterial to consider whether the defendant was or was not the *mahant* of the *math* or whether he had or had not any better title to the temple and the property appertaining to it than a title of mere possession.

An election by *dasnam bhik* of a *mahant* to be a valid and effectual election must be by a majority of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. **P C.** LAHAR PURI *v.* PURAN NATH, 19 C. W. N. 718; 21 C. L. J. 499; 17 BOM. L. R. 475; 18 M. L. T. 39; 29 M. L. J. 75; 2 L. W. 589; 37 A. 298; (1915) M. W. N. 526 **724**

Maintenance. *See* CRIMINAL PROCEDURE CODE, s. 488.

——— ——— grant. *See* HINDU LAW.

——— ———, right of, transfer of **251**

Majority Act (IX of 1875), s. 2, applicability of **587**

Malabar Compensation for Tenants' Improvements Act (I of 1900) 286

——— ——— ——— S. 5—*Decree determining tenancy and directing payment of compensation—Non-payment of compensation—Continuance of tenant on land—Improvements subsequent to decree—"Tenant" entitled to claim compensation under Act.*

A tenant continuing in possession pending receipt of compensation holds subject to the terms of the previous lease, that is, holds as a tenant and retains that status until his improvements are paid for.

The fact that no rent was paid by the tenant or that the decree determining his tenancy credited the value of improvements towards the arrears of rent due, does not alter his position. He is, therefore, a "tenant" under the Act entitled to claim compensation for the improvements effected by him subsequent to the decree. **M.** CHOWAKKARAN KELOTH *v.* KARUVALOTE PARKUM, 29 M. L. J. 144 **559**

Malabar Law—Kanomdar, *right of, to claim compensation for improvements—Malabar Compensation for Tenants' Improvements Act* (*Mad. Act I of* 1900).

A *kanomdar* is entitled to claim compensation for conversion of jungle lands into *parambas*, notwithstanding any provision to the contrary in the deed of mortgage.

A tenant is entitled to claim compensation for improvements according to the Malabar Compensation for Tenants' Improvements Act, 900, if then the terms of the mortgage agreement are less favourable to him than the provisions of the Act. **M** ABDULLA ROWTHAN *v.* VASUDEVA RAVI VARMA, 29 M. L. J. 316 **286**

Malabar tarwad—*Properties given to member in lieu of maintenance—Restraint on alienation except by way of lease—Member's interest, whether attachable—Civil Procedure Code (Act V of* 1908), *s.* 60 (1) (n).

Where certain properties are given to a member of a Malabar *tarwad* in lieu of maintanance under a *karar* which prohibits alienation except by way of lease, his interest in the properties is not exempt from attachment under section 60 1) (*n*) of the Civil Procedure Code. **M.** KOTHAL MAMMAD HAJI *v.* PYDAL NAIR **578**

Malice, proof of—Malicious prosecution **12**

Malicious prosecution—*Damages, suit for —Proof—Conviction of plaintiff in lower Court, effect of.*

In a suit for damages for malicious prosecution the plaintiff must prove the following four things:—

(1) that he was innocent of the crime alleged against him;

(2) that his innocence has been pronounced by a competent tribunal;

(3) that there was a want of reasonable and probable cause for the prosecution; and

(4) that the proceedings against him had been initiated in a malicious spirit.

A conviction in the lower Court of the plaintiff to a suit for damages for malicious prosecution although reversed on appeal is fatal to his suit for malicious prosecution save in very exceptional circumstances. **L. B.** PADASHIN *v.* MAUNG LUN, 8 BUR. L. T. 69 **883**

——— ——— ——— ——— *Want of reasonable and probable cause—Malice, proof of—Complaint false to the knowledge of defendant—Plaintiff guilty of some dishonest act—Defendant not justified in making false allegations.*

In a suit for damages for malicious prosecution, not only want of reasonable and probable cause but also malice is proved if the complaint was false to the knowledge of the complainant. The fact that the plaintiff was guilty of some other dishonest act will not justify the defendant in making allegations against his conduct false to his knowledge. **M.** KHADER UNNISSA BEGAM *v.* MUHAMMAD MUSTAN ALI BADSHA, 2 L. W. 428; 17 M. L. T. 91 **12**

Manbhum Kismats, *nature of, guided by the rule of primogeniture—Maintenance grants to younger branches of family*—Khorposhdar, *interest of, limited —Leases, liability to pay rent under—Sub-soil rights* —Khorposh *grants, heritable, when determinable—Title-deed, forged, effect of.*

In the Nawagarh *zemindari* in Manbhum, Chota Nagpur, *kismats* descend, by the rule of primogeniture, on the eldest sons, maintenance grants being made to the younger branches of the family. Each *kismat* is, to all intents and purposes, regarded as an impartible estate.

The interest of a *khorposhdar*, though more than an interest for one life, is nevertheless a limited interest, liable to be defeated at any time by the failure of heirs, and, therefore, resumable by the proprietor for the time being.

Where the plaintiff's lessors have no title whatever to the sub-soil and are thus incapable of conferring such a title on the plaintiff, he cannot get possession of the land demised in any form.

Manbhum Kismats—concld.

Moneys paid by compulsion of legal proceedings cannot be recovered even if paid within the period of limitation.

Khorposh grants are heritable in the male line and determinable only on the failure of male heirs.

Where it was found that the leases to the plaintiff were only of sub-soil rights, the surface rights being expressly reserved to the lessors:

Held, that the leases conveyed nothing whatever to the plaintiff.

Where it is found that the title-deed on which the plaintiff's suit is based is a forgery:

Held, that the plaintiff's suit must necessarily fail. **C.** JAGANNATH MARWARI *v.* GIRIDHARI SINGHA, 19 C. W. N. 102 **429**

Map—Survey map and *thak* map distinguished—Map drawn for different purpose, how far affects right of property **156**

Marriage. *See* BUDDHIST LAW; MUHAMMADAN LAW.

———— ————Contract Act (IX of 1872), s. 23—Divorce—Custom—Payment to caste—Repugnant to Hindu Law **952**

Master and servant—*Criminal acts of servants—Master, liability of, conditions of—Forest Act (VII of 1878), s. 25 (d), applicability of—Licensee under Forest Act, liability of, for agent's acts—Statute, construction of—"Intention of the Legislature," meaning of.*

A master is not criminally responsible for the acts of his servants, unless he expressly commands or personally co-operates with them or unless the criminal liability is imposed by Statute upon him as regards the acts or omissions of his servants.

In the cases where a master is held liable for the criminal acts of his servants under a Statute, the question is whether upon the true construction of the Statute in question, the master is intended to be made criminally liable for the acts of his servants done within the scope or in the course of their employment.

A licensee under the Indian Forest Act (VII of 1878) would be liable *criminaliter* for every act of his agent, done in carrying on the business delegated to him, which amounts to a breach of the condition of the license made criminally punishable by the Act or any rule thereunder.

Where the owner of a certain number of cattle entrusted them to a grazier who took them into a forest reserve to afford them better pasturage:

Held, that the owner was not criminally liable, though he was civilly liable.

Held, further, that the words of section 25 (*d*) of the Indian Forest Act (VII of 1878) clearly apply only to the person who does any of the acts mentioned therein.

Semble. Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts.

Nothing is to be regarded within a Penal Statute which is not clearly and intelligibly described in the very words of the Statute itself.

The phrase "intention of the Legislature" cannot be extended to cover a speculative opinion as to what

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the Legislature probably would have meant although there has been an omission to enact it. **N.** SAIYYAD RAHIM *v.* EMPEROR, 11 N. L. R. 76; 16 CR. L. J. 485 **325**

————————*Termination of contract of service—No special custom or stipulation—Reasonable notice—Bombay District Municipal Act (Bombay Act III of 1901), s. 167, whether applicable to suit on contract.*

If no custom nor stipulation as to notice exists and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice.

What is "reasonable notice" is a question which varies with the circumstances of the case.

Section 167 of the Bombay District Municipal Act, 1901, does not apply to an action brought on a contract.

Having regard to the standard generally adopted in England for "clerks in superior position" a Municipal Secretary in India is entitled to three months' notice. **S.** MUNICIPALITY OF TATTA *v.* ASSANMAL CHANDOOMAL, 8 S. L. R. 294 **597**

Math, whether can acquire occupancy rights—*Mahant—Chela*—Succession **407**

Merger. *See* MORTGAGE.

———— ————*Mortgage—Hypothecation bonds—Account settled—Agreement to sell certain portion—Suit on bonds, maintainability of—Remedy of plaintiff.*

The defendants mortgaged certain properties to the plaintiffs and also hypothecated the same for certain sums on different dates. On a suit on the hypothecation bonds it was found that a settlement of accounts between the parties had been arrived at and it had been agreed that a certain portion of the property should be sold for the amount due to the plaintiffs. The defendants were still ready to perform the agreement:

Held, that the suit was not maintainable as under the circumstances the only course open to the plaintiff was to sue for specific performance of the contract to sell. **M.** ELICHI USSACK *v.* RAMASWAMI IYER, 28 M. L. J. 662 **982**

Mesne profits. *See* MADRAS RENT RECOVERY ACT, s. 12.

————————, claim for, essence of **195**

————————**or damages,** *suit for—Civil Procedure Code (Act V of 1908), s. 11, O. XX, r. 12, scope of—Title derived from a party, nature of—No issue raised or tried—No bar—Co-defendants.*

Section 11 of the Civil Procedure Code, 1908, contemplates a case where a party derives title from a party to the previous litigation subsequent to the previous litigation.

There is nothing in section 11 of the Code of Civil Procedure to suggest that where the plaintiff has derived no title subsequent to the previous suit, the subsequent suit should involve the consequence of being dismissed.

Where no issue was raised or tried in the former suit between the parties to the new suit:

Held, that the claim was not barred by section 11 of the Code of Civil Procedure.

Order XX, rule 12, does not contemplate anything except the relation between the plaintiff and the

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defendant in a previous suit. There is nothing in Order XX, rule 12, to suggest that it applies between co-defendants. **C.** SURENDRA NARAYAN MITRA *v.* DEJINDRA PROSAD MITRA **464**

Mischief. *See* PENAL CODE, s. 378.

Misrepresentation. *See* CONTRACT ACT, s. 19.

Mortgage—*Agreement to redeem on certain date and in default to leave mortgagee in undisturbed possession, validity of—Subordinate Court, duty of, to follow rulings of its Superior Court—Practice.*

A person mortgaged his land before the Transfer of Property Act came into force by way of usufructuary mortgage for Rs. 800 and agreed to redeem it on a certain date after seven years for Rs. 850 and in default, the mortgagee might take possession. The mortgagor failed to redeem on the due date but sued to redeem a year later:

Held, that there was nothing unconscionable in the contract of the parties and that it is in accordance with equity, justice and good conscience to keep parties to their agreements made voluntarily and with full knowledge when those agreements are themselves reasonable.

It is the duty of a Subordinate Judge to follow the decision of its Superior Court which is binding on it and leave it to the Superior Court to take such action with regard to the conflict of the opinion as it may be advised. **L. B.** MA THIN HTON *v.* MA HNIN THET **709**

——— *Transfer of Property Act (IV of 1882), ss. 88, 89—Application for order absolute—Application in execution—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 182, 183—Civil Procedure Code (Act V of 1908), s. 48—Order absolute—Fresh starting point of limitation.*

A preliminary decree in a mortgage suit passed under section 88 of the Transfer of Property Act is executable and in order to obtain an order absolute under section 89 steps have to be taken in execution; and Article 182 or 183 of the Limitation Act will apply to such applications if the decree happens to be passed by a Mofussil Court or by the original side of the High Court.

A decree-holder will have 12 years under section 48 of the Civil Procedure Code to perfect the preliminary decree and another 12 years under the same section if he gets an order absolute within the first 12 years.

Where a preliminary decree in a mortgage suit was passed on the 7th October 1901 and the first application to obtain an order absolute was made on 6th April 1904 and subsequent applications were made in 1907, 1910 and 1912 all within the three years of the immediately preceding application and all the applications were dismissed without granting the relief prayed for, and the present application was made on the 15th April 1912:

Held, that the application was not barred by limitation. **M.** MAHAMMAD HUSAIN *v.* ABDUL KAREEM, 17 M. L. T. 424 **237**

——— Benamidar *mortgagee, right of, to sue—Mortgagor, whether can object to mortgagee's right—Civil Procedure Code (Act V of 1908), s. 100—Evidence Act (I of 1872), s. 92.*

Mortgage—contd.

A *benamidar* has a right of suit on a mortgage of immoveable property in his favour and it is not open to the mortgagor to raise any question as to the right of the *benamidar* to recover the mortgage debt. **L. B.** MA TUN *v.* MA WAING THA **592**

——— *Construction—Good-will and stock-in-trade mortgaged—Stock acquired after mortgage, if effected.*

A certain person mortgaged the good-will and the stock-in-trade of his business. A list of the stock-in-trade was scheduled to the mortgage-deed. There was a clause in the deed that the stock-in-trade would not be transferred. The scheduled stock was as a matter of fact, subsequently, sold and was re-placed by another:

Held, that the stock-in-trade which was acquired after the mortgage was not affected by the mortgage. **A.** ANDERSON *v.* BANK OF UPPER INDIA, LTD., 13 A. L. J. 489; 37 A. 390 **984**

——— *Decree, sale under—Fraud, allegation of—Execution, who may come in in—Party having no interest in property when decree passed, right of.*

Where the plaintiffs had no interest in the property at the time the mortgage-decree was passed and the property was not ancestral:

Held, that they could not come in in execution to set aside the decree. **C.** NAGESUR PERSHAD SINGH *v.* BINDESHWARI PROSAD SINGH **402**

——— *Endowed property—Mortgagee from trustee—Limitation—Limitation Act (IX of 1908), s. 10, Sch. I, Art. 134—Limitation Act (IX of 1871), s. 10.*

A suit for possession of an endowed property against a person who has been holding it as a mortgagee from the trustees of the property for over 12 years, prior to the coming into force of the Limitation Act IX of 1871, on the ground that the alienation was null and void, is barred by limitation. **A.** AMIR SHAH *v.* TULA PANDE, 13 A. L. J. 612 **292**

——— Enhanced Government revenue, whether payable by mortgagor or mortgagee **386**

——— *Equity of redemption purchased by mortgagee—Merger—Incumbrances in favour of mortgagee, effect on—Extinguishment of mortgage—Transfer of Property Act (IV of 1882), s. 101, scope of—Question of intention in each case—Proof of intention.*

A purchase by a mortgagee of the equity of redemption extinguishes the mortgage, unless circumstances exist at the time of the purchase which show an intention to prevent the merger.

A mortgagee-purchaser of the equity of redemption of his mortgage can use his previous mortgage only as a shield if there are mesne incumbrances and only in respect of the properties which are covered by such incumbrances, but he is not entitled to sue upon his mortgage.

Per *Wallis, C. J.*—The word 'absolutely' in section 10 of the Transfer of Property Act, cannot mean that there are no mesne incumbrances.

Per *Seshagiri Aiyar, J.*—In cases where a subsequent clause in a deed is inconsistent with the operative portion of it, the cardinal principle of construction which should guide Indian Courts is to ascertain the intention of the parties. Technical rules of construction should, as far as possible, be avoided.

Section 101 of the Transfer of Property Act leaves untouched the general rule of law that when a mortgagee purchases the equity of redemption, the incumbrance in his favour is extinguished. It only

Mortgage—contd.

enacts that where there are other mortgages on the property, an intention will be imputed to the mortgagee-purchaser that he intended to keep alive his own mortgage as a protection against subsequent claimants. **M.** ARUMUGASUNDARA *v.* NARASIMHA IYER, (191) M. W. N. 397; 2 L. W. 542; 18 M. L. T. 110 **916**

—— —— Equity of redemption, sale of—Purchaser, right of, to redeem **305**

—— —— executed in order to defeat creditors, if void Consideration paid in part—Suit to enforce mortgage security—Lien **690**

—— —— by father—Hindu Law—Debt neither antecedent nor for family purposes, nor immoral —Suit against sons—Limitation Act (IX of 1908), Sch. I, Arts. 120, 132 **629**

—— —— *of fixed-rate tenancy—Mortgagor dying heirless—Ejectment of mortgagee without redemption —Revision.*

If a fixed-rate tenant mortgages his holding usufructuarily and then dies without leaving an heir the land-holder cannot eject the mortgagee in possession without paying off the mortgage-money.

An order wrongly directing the ejectment of a mortgagee in possession deprives the mortgagee of his legal rights and is, therefore, a serious error of law which justifies interference in revision. **U. P. B. R.** NAND KISHORE PANDE *v.* MUHAMMAD HASAN **555**

—— —— Grove, mortgage of—Mortgagor dying without heirs—Mortgagee, whether can be ejected —Grove, if constitutes improvement **560**

—— —— Merger—Hypothecation bonds—Account settled—Agreement to sell certain portion—Suit on bonds, maintainability of—Remedy of plaintiff **982**

—— —— Mortgage-decree making judgment-debtor personally liable for deficiency—Sale of other properties belonging to him—Application by decree-holders for rateable distribution—Order, whether appealable—Execution application praying for specific reliefs—No final orders passed—Madras Civil Rules of Practice, r. 167 **231**

—— —— *Mortgage for Rs.* 105 *unregistered but known to subsequent purchaser, proof of, if necessary —Evidence Act* (*I of* 1872), *s.* 58—*Subsequent purchaser, right of.*

Where the purchaser of certain lands admitted previous knowledge of a mortgage of part of the lands in possession of the mortgagee:

Held, that it was unnecessary to prove the mortgage in a suit for possession by the purchaser against the mortgagee and that the fact that the mortgage-deed was for Rs. 105 and was unregistered was immaterial.

Held, further, that the purchase being subject to the mortgage, the purchaser could not recover the land without paying the mortgage-money.

An admission made by a party when examined as a witness comes within the purview of section 58 of the Evidence Act. **U. B.** NGA TUN LU *v.* NGA SHWE CHIN, 8 BUR. L. T. 18 **698**

—— —— Mortgagee selling absolute interest in mortgaged property—Redemption—Limitation **403**

—— —— *Mortgagor, payment by, to one mortgagee —Endorsement on mortgage-deed, value of—Payment, whether amounts to discharge—Mortgagor, duty of—*

Mortgage—contd.

Probate and Administration Act (*V of* 1881), *ss.* 4, 92—*Endorsement as to receipt of mortgage-money by one executor mortgagee, value of.*

Two of the sons of a deceased testator were made executors of his Will. The two sons invested the moneys they had in their hands in mortgages. One of the brothers alone sued to enforce the mortgage security making the other brother defendant. The mortgagor pleaded payment of certain amounts to the other brother, as evidenced by endorsement on the mortgage bond, and claimed to be credited for the amounts:

Held, that notwithstanding that the money in fact formed a portion of the estate of the deceased, it did not vest in the executors as such under section 4 of the Probate and Administration Act, but vested in them by virtue of the bonds which were given to them by the mortgagor and that, therefore, the endorsement did not amount to a discharge under section 92 of the Act.

Held, further, that the money was lent on a joint account and it was the duty of the defendant mortgagor in making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. **C.** CHANDRA MOHAN BANERJEE *v.* SATYA KRIPAL **139**

—— —— *Occupancy holding and fixed-rate holding mortgaged together for lump sum—Whole transaction, if illegal.*

Where an occupancy holding and a fixed-rate holding are mortgaged together for a lump sum, and the contract is one and indivisible the whole transaction is void. **/.** JWALA PRASAD RAI *v.* RAM SARUP RAI **923**

—— —— *Non-transferable occupancy holding—Rent-sale, effect of—Civil Procedure Code* (*Act V of* 1908), *O. XXI, r.* 89, *scope of—Decretal amount, who may deposit in Court.*

Where the mortgagee of a non-transferable occupancy holding, which was brought to sale in execution of a rent-decree and purchased by the landlord decree-holder, sought to deposit in Court the decretal amount and compensation under Order XXI, rule 89, Civil Procedure Code:

Held, that the mortgagee had not any interest under the rule in question, and so his depo-it could not be accepted by the Court. DENO NATH DEY SARKAR *v.* KALI KUMAR ROY **916**

—— —— *Representation*—Mitakshara *family—Redemption, equity of, member of* Mitakshara *family having interest in—Failure to produce that member before Court, effect of—Transfer of Property Act* (*IV of* 1882), *s.* 85, *scope of.*

The principle laid down by the Judicial Committee in the case of *Sheo Shankar Ram* v. *Musammat Jaddo Kunwar*, 24 Ind. Cas. 504; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 12 A. L. J. 1173; 16 Bom. L. R. 810 (P. C.); 20 C. L. J. 282; 36 A. 383, is to be applied in preference to that adopted in *Lala Suraj Prosad* v. *Golab Chand*, 28 C. 517; 5 C. W. N. 640, in cases where the doctrine of representation is properly applicable to the facts and where the mortgagee is found to be not aware of the existence of a member of a joint *Mitakshara* family as interested in the equity of redemption and

Mortgage—contd.

so does not bring him before the Court in the mortgage suit. **C.** RAGHORAM SINGH *v.* RAJANI KANTA BANERJEE, 21 C. L. J. 452 **752**

———————Several mortgagees—Payment by mortgagor to one mortgagee, if valid **956**

———————, simple, whether *rehan* **554**

———————— of *sir* before 1901—Sale of equity of redemption in 1905—Mortgagors minors—Ex-proprietary rights claimed by mother of minors—Mother's claim wrongly disallowed—No appeal preferred—Subsequent suit for declaration of ex-proprietary rights **675**

———————— *of* sir *land before the passing of the Agra Tenancy Act* (*II of* 1901), *effect of, on* sir *land.*

A mortgage with or without possession before the 1st day of January 1902 has no effect whatever upon *sir*. **U. P. B. R.** GANGA PRASAD PANDE *v.* TUNDI AHIR **565**

———————— *Subrogation—Purchaser of mortgaged property, right of—Partial payment of mortgage-money.*

The purchaser of a mortgaged property cannot claim the right to subrogate as against a puisne incumbrancer when he has paid only a portion of the mortgage-debt. **M.** BESINATH KARUMANI *v.* DEVI DOSS **511**

———————— *Subsequent mortgagee, made party to suit on prior mortgage—Failure to appear—Right to raise afterwards plea of payment of prior lien—Test.*

A subsequent mortgagee who has been made party to a suit on a prior mortgage but who has failed to appear cannot afterwards raise the plea that he had paid off a prior lien and was, therefore, in the position of a prior mortgagee.

The test in all such cases is, was the defendant impleaded as a puisne mortgagee and, therefore, a necessary party, if he was, he is bound to set up his prior mortgage as well as his subsequent mortgage. **C.** HANKAR RAI *v.* KAMTA PROSHAD SAHU, 19 C. W. N. 947 **875**

———————Usufructuary and simple mortgage in favour of same person—Mortgagee purchasing some of mortgaged property—Suit on simple mortgage—Liability of property purchased to rateable contribution **124**

————————**Redemption**—*Redemption decree—Failure to pay within time fixed—Payment before decree absolute—Mortgagor if entitled to redeem.*

In a redemption suit the mortgagor decree-holder who fails to pay the redemption money upto the date fixed for payment but pays it before the decree is made absolute, is entitled to redeem the property on such payment. **A.** AMBIKA PERSHAD *v.* SALAMAT KHAN **438**

———————————*Redemption decree — Time fixed for payment of money—Appellate Court extending time and fixing another date, effect of—Interest.*

In a redemption suit a certain date was fixed in the decree for payment of the money and it was provided that up to that date the mortgagor would pay interest at the contractual rate. The plaintiff appealed to the High Court. The High Court confirmed the decision of the Court below and, extending the period for payment of the money, fixed another date:

Held, that the effect of the extension of time by the Appellate Court was to substitute the date fixed by that Court for that fixed by the first Court, and that the mortgagee was entitled to interest at the contract rate up to the date fixed by the Appellate Court. **A.** RAM NARAIN *v.* GOBIND PERSHAD **289**

———————— *Husband's mortgage, if widow can redeem unconditionally.*

In a case where the wife wants to recover the property which is found to have been mortgaged by her husband for debts for which her husband's property in her hands would be justly liable:

Held, that to allow her to recover her property without any condition is not equitable. **C** SANATAN CHAKRAVARTI *v.* KAURI MANI DASI **925**

————————————, *right of—Plaintiff, whether compelled to set up prior mortgage against his Will.*

One *K S* was the owner of a certain *zemindari*. One of the four sons of *K S* mortgaged a one-fourth share to the father of *R*, the defendant, on the 7th of December 1877. On July 27th, 1877, the whole property was usufructuarily mortgaged by the four sons to *Z*. The entire consideration of *Z*'s mortgage went towards satisfying a decree for sale obtained on a previous mortgage of 1872. The plaintiffs, having acquired certain shares in the equity of redemption from some of the descendants of *K S*, redeemed the entire mortgage from *Z*. *R* brought a suit on her father's mortgage and she impleaded only the son of her mortgagor and also *Z*, but not the present plaintiffs. She obtained a decree for sale of the one-fourth share and purchased it herself. The plaintiffs then brought the present suit for redemption of the mortgage of December 7th, 1877:

Held, that the plaintiffs were entitled to redeem the mortgage of the 7th of December 1877 and that whatever rights *Z* or the plaintiffs, as her successors-in-interest, might hold in respect of the mortgage of 1872, these were not rights which the plaintiffs could be compelled to set up or to exercise against their will and that the possible existence of such rights did not affect the position of the plaintiffs as mortgagees subsequent to the defendant.

Held, further, that *R* as auction-purchaser of the equity of redemption, had a right of redemption. **A.** RAM PIARI *v.* RAGHUNATH SINGH **794**

————————————, *suit for—Civil Procedure Code* (*Act V of* 1908), *s.* 66, *applicability of—Old Code and new Code compared.*

In a suit for redemption where it is found that an execution sale and a *benami* purchase took place in 1895, long before the passing of the present Code in 1908, and that at that time and afterwards and until the passing of the present Code the plaintiff had a vested right of redemption:

Held, that it ought not to be assumed, in the absence of any express words to that effect, that that right was taken away from him by the provisions of section 66 of the Code of Civil Procedure

Under the old law section 66 was only applicable to the certified purchaser, but as it is now

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amended it applies also to persons standing in the shoes of the purchaser. **C.** ASAD ALI *v.* BUJRUS MEHER BIBI **716**

———————, *suit for—Mortgagee, whether can question mortgagor's title—Equity of redemption, vesting of—Attornment of mortgagee to superior landlord, effect of.*

A mortgagee cannot be permitted to resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage.

But the mortgagee may establish that the title of the mortgagor has expired since the creation of the mortgage; in other words, that the equity of redemption is no longer vested in him so as to entitle him to redeem the mortgage.

As between a mortgagor and a mortgagee the attornment by the latter to the superior landlord cannot in any way prejudice the rights of the former. **C.** ABHURAM SIL *v.* HARA CHAND DAS **746**

Mortgage-bond, *suit on, for recovery—Hard and unconscionable bargain—Contract Act (IX of 1872), s. 16—Security, if ample, effect of—Undue influence, presumption of—Rate of interest, excessive, effect of—Personal loans—Compound interest, stipulation of, when a penalty—English Money Lenders' Act compared—English Judge's dicta to be followed.*

The Courts have ample powers under the amended Contract Act to go behind hard and unconscionable bargains on the ground that where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate.

The attempt to conceal the real rate of interest by describing it as one pice in the rupee per mensem or, as in the present case, Rs. 5 per mensem is evidence of an intention to get the better of the debtor, and the law seems to be that there must be a footing of complete equality between debtor and creditor and they must be, so to speak, at arm's length to make a bargain, which is in itself harsh and unconscionable enforceable at law.

Under the amended section 16 of the Contract Act the question of a harsh and unconscionable bargain can only be considered in reference to undue influence.

Where there is ample security an excessive rate of interest has been held to be anything over 10 per cent. Where there is no security, no rate of interest can be considered excessive. There can be no standard rate on personal loans.

Where the parties are reasonably on terms of equality, a Judge cannot do better than adopt what they themselves have agreed on.

A presumption of undue influence could arise from the fact that a security of over Rs. 3,000 with mortgage already on it for a much smaller amount was given for a loan of Rs. 80.

Where a contract is for a temporary accommodation, the stipulation that interest is to run at Rs. 5 a month is one which necessitates the payment of interest not at 60 per cent. per annum but at Rs. 5 in each month, and a stipulation that in default of 12 months' instalments of interest compound interest would begin to run at 60 per cent. is in the nature of a penalty.

Mortgage-bond—concld.

It is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature.

Excess of interest or charges may itself be evidence of a harsh and unconscionable bargain and particularly, if it is unexplained. If no justification be established the presumption hardens into a certainty.

The amendments in the Indian Law of Contract go further in the direction of relief against harsh and unconscionable bargains than those of the English Money Lenders' Act and, therefore, the dicta of English Judges under that Act might be accepted.

Where it is found that there is technically a penalty in the bond, Judges should go behind the contract, which is one and indivisible, as to interest and refuse compound interest altogether. **C.** ABDUL MAJID *v.* KSHERODE CHANDRA PAL, 19 C. W. N. 809; 42 C. 690 **843**

Mortgage-decree making mortgagor "personally liable for balance due under the decree" after sale of mortgaged property, whether a decree for "payment of money" on a certain date—Twelve years to be calculated from date of decree or from date when sale-proceeds prove insufficient to satisfy decree—Decree against estate managed by Court of Wards—Decree not transferred to Collector for execution—Mortgagee, whether entitled to benefit of exclusion of period of management by Court of Wards **556**

——— ——— **or sale**—*Transfer of Property Act (IV of 1882), ss. 54, 59, 55 (6) (b)—Transaction without registered document when transaction compulsorily registrable, effect of.*

Where the defendants were put into possession of two plots of plaintiffs' land, five or six years before the suit, without any registered document on payment of Rs. 100 in respect of each plot and where the transaction was either an abortive mortgage (according to the plaintiffs) or an abortive sale (according to the defendants):

Held, that in either case the plaintiffs were entitled to possession upon payment of Rs. 200 as under the provisions of sections 54 and 59 of the Transfer of Property Act an oral transfer could effect neither a mortgage nor a sale and the defendants were entitled only to a charge on the land under section 55 (6) (*b*) for the purchase-money paid by them. **L. B.** MAUNG YEIK *v.* MAUNG PE TO, 8 BUR. L. T. 70 **886**

——— ——— **suit,** *decree in, application for order absolute for sale of—Limitation—Civil Procedure Code (Act V of 1908, O. XXXIV, r. 5.*

An application for an order absolute for sale in a mortgage-suit is a proceeding in execution and must be made within the time prescribed by the Limitation Act. **C.** KRISHNA BAR *v.* RANAMOYI DEBI, 19 C. W. N. 470 **120**

——— ——— ———*Money-decree — Purchase by prior mortgagee — Subsequent mortgage by heir—Suit for sale by subsequent mortgagee—Suit for declaration that house was not saleable by prior mortgagee, maintainability of.*

A creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by an heir-at-law, whether the alienation had been by an absolute sale or by a mortgage.

Mortgage suit—concld.

One *A* mortgaged a house to the predecessor-in-title of the plaintiff. On *A's* death, his widow, *J*, mortgaged the same house to the defendant. The plaintiff brought a suit on his mortgage impleading the present defendant as a subsequent mortgagee, but he got only a simple money-decree in execution of which he put the house to sale and purchased it on 23rd June 1913. In the meantime the defendant had brought a suit upon his mortgage and obtained a decree for sale of the house on the 24th September 1912. The plaintiff then brought the present suit for a declaration that the house was not saleable in execution of the defendant's decree:

Held, that the plaintiff, by his auction purchase, acquired no title to the house which could override the rights of the defendant under his mortgage or under his decree. **A.** KAZMI JAN *v.* SHIB CHARAN **757**

Mortgagee—Tenant - Rent-paying grove mortgaged—Suit for arrears of rent against mortgagor—Mortgagee not made party—Ejectment of mortgagee **676**

Mortgagor and mortgagee—*Occupancy holding, mortgage of—Void mortgage—Mortgagor, if can eject mortgagee without paying mortgage-money—Landlord and tenant, relation of, if exists between.*

A mortgagor of an occupancy holding who has put the mortgagee in possession cannot eject him from the holding, on the ground merely that the mortgage is void under the Tenancy Act, without re-paying the mortgagee the money which he has received from him.

The relation of landlord and tenant does not exist between the mortgagor and the mortgagee, where rent is not payable by the mortgagor nor is there any contract, express or implied, but for which it would be payable. **U. P. B. R.** RUP SINGH *v. Musammat* BEERA **490**

Muhammadan Law. *See* PRE-EMPTION.

——— ——— ——— **Divorce**—*Wife, right of.*

Muhammadan Law does not give a wife any authority, except possibly in accordance with a contract entered into at the time of the marriage, to prevent her husband divorcing her by the pronouncing of *talak*. **U. B.** HASAN CHANEA *v.* MI SIN, U. B. R. 1915, II, 53; 16 CR. L. J. 531 **659**

——— ——— ——— **Dower**—*Father, whether can be made liable for dower-debt of his son—Majority Act (IX of* 1875), *s.* 2, *applicability of.*

Section 2 (*a*) of the Indian Majority Act provides that nothing in that Act shall affect the capacity of any person to act in the matter of dower and the fact that a Mussalman is a minor at the time of his marriage does not take away his liability to pay the dower of his wife.

Where the son was not a minor under the Muhammadan Law at the time of his marriage, his father, in the absence of a contract of guarantee, cannot be made liable for the dower payable by his son simply on the ground that the son has no property. **M.** SAYABKHAN SANDOJAI *v.* BEEBEE KHATHOO **587**

Muhammadan Law—contd.

——— ——— **Fosterage**—*Natural son and foster daughter, marriage between, if legal—Relations of girl, if can question validity of marriage*—Factum valet, *principle of, how far applicable.*

Under Muhammadan Law the prohibition regarding marriage attaching to a woman's natural son and foster-daughter is absolute, and not conditional upon the birth of the one and the suckling of the other occurring within any limited period.

It is not lawful for a female to marry any of the sons of the woman who has suckled her, because they are her brothers by fosterage.

Where the paternal relations of a girl brought a suit questioning the validity of the girl's marriage within four months of the marriage, and it appeared that the guardian of the girl had been abusing his position as guardian:

Held, that there was no error in granting the plaintiffs' prayer and allowing the plaintiffs to question the validity of the marriage.

The principle of *factum valet* does not render good in law a marriage which ought not in law to have been celebrated. **C.** JANAB ALI MIA *v.* NAZAMADDIN PRADHANIA, 19 C. W. N. 897 **871**

——— ——— ——— **Gift**—*Necessity for delivery of possession—Minor, donee—Donor,* de facto *guardian—Gift of land—Delivery of possession how to be proved—Transfer of Property Act (IV of* 1882), *ss.* 6 (*a*), 43—*Transferor representing himself to be an absolute owner when he is not—Subsequent acquisition of title by inheritance—Transfer, validity of.*

Where the transferor represents himself to be absolute owner of the property transferred, when he is not, and on a date subsequent to the transfer, acquires title to such property by inheritance, the transfer is not a transfer *spes successionis* and invalid under section 6 (*a*) of the Transfer of Property Act but is one under section 43 of the Transfer of Property Act and is enforceable against the transferor.

The principle of section 43 of the Transfer of Property Act applies equally both to sales and mortgages.

Under Muhammadan Law, it is essential for the validity of a gift that there should be a transfer both of ownership and possession. What this possession is, is a question of fact in each case. Where the donor is the *de facto* guardian of the minor donee, a mere declaration of intention to hold the property on behalf of the minor is quite sufficient. But it is necessary that the person in whose possession the property is must be in a position to act on behalf of the owner; where he is not, the declaration would be of no effect. Everything depends upon the intention with which possession was held by the donor subsequent to the gift.

Where the property gifted is land, which can be enjoyed by receipt of its produce, possession will be deemed to be in the minor, only when it is shown, that after the gift, he was in receipt and enjoyment of such produce also.

In order that a gift in favour of a minor should be valid, it is not necessary that possession to complete his title must be given to his guardian alone; it is sufficient if there is a trustee who can act on his behalf.

Muhammadan Law—contd.

Where the donor himself is in possession of the property gifted, there must be some act of his, which must show that he intended to hold the property on behalf of the minor; where there is no such act the presumption is that he never intended to make any gift.

It would be inequitable to allow the visible means of a man to be narrowed down by a transaction not evidenced by a contract. **M.** ALAMANAYAKUNIGARI NABI SAB *v.* MURUKUTI PAPIAH **439**

———————**Marriage**—*Apostasy, effect of—Motive, immaterial.*

Under the Muhammadan Law the fact of either or both of the parties to a Muhammadan marriage renouncing the Muhammadan religion has the effect of dissolving the marriage *ipso facto*.

If the apostasy is an accomplished fact and if it is not proved to be a colourable transaction, the Court cannot decline to give effect to it because the underlying motive was not a proper one. **P.** GHAUS *v.* FAJJI, 123 P. W. R. 1915 **857**

———————*Betrothal contract—Girl breaking betrothal on attaining majority—Non-liability of her guardian for damages.*

A Muhammadan girl, after attaining the age of majority, is at perfect liberty to marry any man she likes; and if she then breaks her betrothal contract made by any of her guardians during her minority, neither the guardian nor his representative-in-interest is liable for any damage on account of the breach. **P.** IMAM DIN *v.* KAMAL, 82 P. W. R. 1915; 168 P. L. R 1915 **750**

———————*between a* Hanafi *and a* Shafi *girl—Girl's father not consenting—Marriage, if valid*—Siyeeba.

Where the marriage ceremony between a *Hanafi* and a *Shafi* girl was hurriedly and clandestinely gone through with the knowledge that the girl's father did not and would not consent to it, and to satisfy the Mullah, should that be necessary, the story of her conversion to the *Hanafi* sect was invented:

Held, that the circumstances under which and the manner in which the so-called marriage was performed were such that the usual presumption in favour of its validity could not be made;

that it was invalid for want of consent of the girl's father;

that under *Shafi* Law a woman who under any circumstances had connection with a man became *Siyeeba*. **L. B.** RAHIMA BI *v.* MAHAMED SALEH, 8 L. B. R. 54 **866**

———————**Succession**—*Heirs deceased Muhammadan—Tenants-in-common—Heir, one, right of, when barred—Adverse possession—Knowledge—Execution suit for share—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 120, 144, *when applicable.*

To a suit brought by one of the heirs to recover his share of the estate left by a Muhammadan who died intestate, Article 144 of the Limitation Act is applicable if the property is immoveable, but if it is moveable, Article 120 is applicable.

The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred, unless and until the other heirs set up an adverse right to the knowledge of that heir. Mere intention on their part will not affect the character of possession, nor is the heir bound to inquire whether there has been an adverse dealing with his property.

Where the other heirs are in entire charge of property, the heir sought to be excluded is not bound to assure himself that he is not excluded from inheritance and that his interests will not be looked after by them.

The right of an heir to claim interest arises only from the date when he makes a demand and that is met by a refusal. **M.** MARIAN BEEVIAMMAL *v.* KADIR MEERA SAHIB TARAGAN **275**

Muhammadan Law—concld.

———————**Waqf property**—Mutawalli, *right of, to partition—Arrangement between* Mutawallis *as to enjoyment of* inam *lands—Right to question arrangement—Proper course—No* Mutawalli—*Court, jurisdiction of, how exercised—Suit for possession, maintainability of—Civil Procedure Code* (*Act V of* 1908), *s.* 92, *applicability of.*

There is no power in the *mutawalli* of a mosque to effect a partition of the land belonging to a mosque and where he purports to do this, his act is illegal.

Where there is an alienation of the *waqf* property anybody interested in its due administration may question it, though he is not the *mutawalli* and not entitled to be put into possession of the property.

The texts of Muhammadan Law ordinarily contemplate only one *mutawalli*, but when two or more persons are appointed with the intention that they should jointly administer a single *waqf*—and there is nothing to prevent such an appointment—their position would be similar to that of any other body of co-trustees. A "partition" between them would not affect their legal position or joint responsibility.

Where there is a *waqf* and no person is lawfully administering it, the Court can designate a person who, in accordance with the terms of the dedication, is entitled to act as *mutawalli* or, if there is no *waqfnamah*, it can appoint somebody as *mutawalli* and for the proper administration of the *waqf* can remove a *mutawalli*.

Such jurisdiction can be exercised only by "directions necessary for the administration" of the trust.

A person without instituting a suit under section 92 of the Civil Procedure Code cannot seek to oust from possession, persons who claim to hold as trustees. **M.** MAHOMED GHOUSE *v.* MOIDEEN SIDDIKH, 18 M. L. T. 48 **849**

Murder. *See* PENAL CODE, ss. 299, 300.

Mutation—*Oudh* taluqa—*Law of primogeniture—History of estate—Will of doubtful validity—Stranger—Male collateral.*

An Oudh *taluqa* had always descended, until the death of one *S*, strictly according to the law of primogeniture to the nearest male relative. Under a Will of *S*, at first his mother and upon his mother's death his daughter succeeded to the *taluqa*. Upon the daughter's death her husband claimed the estate under an alleged Will of his deceased wife:

Held, that having regard to the past history of the estate it should not be mutated in favour of an utter stranger on the basis of an alleged Will, until its validity was established in a Civil Court

Mutation—concld.

but should be mutated in favour of the nearest male collateral of S, who appeared to be the person best entitled to the property. **U. P. B. R.** SITLA BUX SINGH *v.* GAJRAJ SINGH **651**

Mutwalli, right of. *See* PARTITION.

——— — *Civil Procedure Code (Act V of* 1908), *s.* 92, *scope of reliefs under*—Mutwalli, *appointment of, by founder*—Mutwalli, *when and how can resign* mutwallishiip—*Appointment by founder, how far affects original deed of* wakf.

Where the plaintiff does not claim any of the reliefs under section 92 of the Code of Civil Procedure and does not ask the Court to appoint him a *mutwalli*, but only asks to declare that he is the rightful *mutwalli*, and where the defendant is not sued for recovery of possession:

Held, that the suit is incompetent.

A *mutwalli* who is not himself the appropriator cannot renounce and appoint another *mutwalli*.

If the *mutwalli* appointed by the founder says, "I resign my *mutwallishiip*," this declaration has no effect unless it is made in the presence of the founder or the *Cadi*, who would thereupon remove him.

An appointment of *mutwalli* by the founder cannot enure against the express terms of the original deed of *wakf* and must terminate with the life of the *wakif*. **C.** ABDUL GHAFOOR MIAH *v.* ALTAF HOSAIN **423**

Negotiable Instruments Act (XXVI of 1881), ss 9, 32, 56, 59—*Promissory note, maker of, liability of—Continuing security—Indorsements, effects of—Fraud, person liable for.*

The maker of a promissory note undertakes and is bound to pay at its maturity according to its apparent tenor.

A promissory note payable on demand is regarded as a continuing security.

Indorsements of payment may be made on a negotiable instrument under section 56 of the Negotiable Instruments Act, (XXVI of 1881) and the note then becomes negotiable only for the balance due but if no indorsement is made, the note remains negotiable for the full amount expressed on it.

If the payee commits fraud by transferring the note for the full value without informing the indorsee that some payments have been made, the person to suffer by the fraud is the person who by his omission to insist on his payments being indorsed on the note enabled the fraud to be committed. **L. B.** VITHALDAS KHANDAS *v.* INDRAVELLU, 8 BUR. L. T. 161 **936**

——— ——— ——— *Material alteration—Promissory note—Finding—Revision.*

In a suit on a promissory note one of the defences was that the document had been materially altered and as such could not be the basis of a suit. The Small Cause Court Judge did not record any definite finding as to the note being materially altered and decreed the plaintiff's suit on the ground that even if the note was executed on the date alleged, the suit was within time by reason of the payment of interest within time:

Held, that as the promissory note was not payable to the plaintiff or his order, it was not a negotiable instrument within the meaning of section 87 of the Negotiable Instruments Act and justice having been done between the parties, it was not proper for the High Court to interfere in revision and remand the case for a finding as to material alteration. **A.** MAKHDUM BAKHSH *v.* SHAUKAT ALI, 13 A. L. J. 683 **1008**

——— ——— ——— **s. 32** **936**

——— ——— ——— ——— **s. 37**—*Pro-note — Joint promisors, liability of—Evidence Act (I of* 1872), *s.* 92—*Contract Act (IX of* 1872), *ss.* 44, 134.

The executants of a pro-note should be regarded as principal debtors under section 37 of the Negotiable Instruments Act, 1881, in the absence of a contract to the contrary. In such a case section 44 of the Contract Act applies and the plaintiff's relinquishment of his claim against one does not involve a discharge of the other. **L. B.** VELLIAN CHETTY *v.* WOOMIDY VIRAMAH **760**

——— ——— ——— ——— **s. 56** **936**

——— ——— ——— ——— **s. 78**—*Promissory note —Suit by beneficial owner, whether maintainable.*

A person who is entitled to the possession of a promissory note in his own name is alone entitled to sue upon it whether the instrument be negotiable or not. **A.** DORI LAL *v.* SEWAK RAM, 13 A. L. J. 695 **988**

——— ——— ——— ——— **s. 87** **1008**

——— ——— ——— ——— **s. 359** **936**

Non-transferable occupancy holding—Sale of, effect of **734**

North-Western Provinces Rent Act (XVIII of 1873)—*Compensation—Improvements*—Thekadar, *whether a tenant*—Thekadar's *right to make improvements and claim compensation.*

The appellant held certain land as a *thekadar* under a lease of 1859, which provided that he should make *bandhis* and establish hamlets. The *zemindar* brought the present suit for ejectment and the *thekadar*-appellant claimed compensation for improvements made by him before 1880:

Held, that the claim was governed by the provisions of the N.-W. Provinces Rent Act, XVIII of 1873, which allowed compensation for improvements to a tenant, but did not define the term 'tenant', and that it not being clear whether a '*thekadar*' was entitled to get compensation under that section, his claim must be dismissed. **U. P. B. R.** DILAWAR BUX *v.* DATA DIN **478**

Notice. *See* CENTRAL PROVINCES MUNICIPAL ACT, s. 66 (5); OUDH RENT ACT, s. 107E (*b*).

Occupancy holding, mortgage of, validity of—Mortgagor, if can eject mortgagee without payment of money **490**

——— ——— — ——— —*Mortgage before Agra Tenancy Act (II of* 1901)—*Relinquishment after Act, effect of.*

Where an occupancy holding was usufructuarily mortgaged for good consideration before the passing of the Agra Tenancy Act and where the mortgagor after passing of the Act relinquished the holding to defeat the mortgagee's rights:

Held, that the relinquishment was ineffectual against the mortgagee. **A.** BIRJ KUMAR LAL *v.* SHEO KUMAR MISSIR, 13 A. L. J. 649 **215**

Occupancy holding—concld.

———— ———— ————, *if can be sold—Co-sharer landlord decree-holder, position of Holding not to be sold, if* raiyat *objects—Transfer, involuntary, of whole or part of holding, how far valid.*

An occupancy holding which is not saleable by custom or usage cannot be sold in execution of a decree obtained by a co-sharer landlord for his share of the rent, and in this respect a co-sharer landlord is in the same position as an ordinary executing creditor.

A *raiyat* is entitled to have a sale of his holding in execution of a money-decree set aside after it takes place, and the holding cannot be sold in execution of such a decree where the *raiyat* objects to the sale before it takes place.

A non-transferable occupancy holding is not a saleable property.

The principle deducible from the decision in *Dayamoyi* v. *Ananda Mohan Roy Chowdhury*, 27 Ind. Cas. 61; 20 C. L. J. 52; 42 C. 172; 18 C. W. N. 971 (F. B.), is applicable to an involuntary transfer of the whole as well as of a part of the holding.

A co-sharer landlord is not entitled to sell the whole or part of the occupancy holding of the *raiyat* in execution of a decree obtained by him against the *raiyat*. **C.** BADARENNESSA *v.* ALAM GAZI, 19 C. W. N. 814; 21 C. L. J. 650 **877**

———— ———— ————*Suit for declaration of title between rival tenants—Landlord not party to suit—Civil or Revenue Court—Jurisdiction.*

A suit between rival claimants to an occupancy holding, to which the landlord is no party, for a declaration of title or in the alternative for possession is cognizable by a Civil Court. **A.** INAYAT-UN-NISSA *v.* SALIM-UN-NISSA **568**

Occupancy right, acquisition of. *See* AGRA TENANCY ACT, s. 11.

———— — ————, non-transferability of. *See* BENGAL TENANCY ACT, s. 49.

———— ———— in accretion, acquisition of—Limitation **37**

Oudh Rent Act (XII of 1881), s. 9—*Agra Tenancy Act (II of* 1901*), s. 22—Male occupancy tenant dying while Rent Act in force—Succession by widow—Widow dying after Tenancy Act came in force—Succession—Brother's right to succeed without proving sharing in cultivation.*

The plots in suit along with other plots were the joint holding of three brothers *R*, *J* and *K*, who separated in the life-time of *K* and a division of holding took place. *K* died while the Rent Act was in force and was succeeded by his widow who died after the coming into force of the Tenancy Act. Upon the widow's death, *R* and the son of *J* who had died claimed the holding:

Held, that the widow having died while the new Act was in force, succession was governed by section 22 of the Tenancy Act and not by section 9 of the Rent Act and that *R* was, therefore, entitled to succeed his brother *K* without any sharing in cultivation being proved.

But the son of *J* not having co-shared in cultivation with *K* at the latter's death could not succeed to the holding. **U. P. B. R.** RAMANAND RAI *v.* MUHAMMAD ABDUL BASHAR **548**

Oudh Rent Act (XXII of 1886), s. 5—*Occupancy rights—Mortgage, if loss of proprietary rights—Foreclosure, effect of—Loss of proprietary rights after annexation—Accrual of occupancy rights.*

Under section 5 of the Oudh Rent Act, occupancy rights arise only when there has been a complete loss of proprietary rights and do not arise when the proprietor retains part of his proprietary rights, as in the case of a mortgage. In the case of a mortgage, complete loss of proprietary rights occurs only when a decree for foreclosure is obtained.

Occupancy rights arise under section 5 of the Oudh Rent Act, XXII of 1886, not only in favour of those proprietors who have lost their proprietary rights before the date of annexation of Oudh (13th day of February 1856), but also in favour of those who have so lost their rights between that date and 24th day of August 1866. **U. P. B. R.** MATA PRASAD *v.* SHEO RAJ KUAR **401**

———— ———— ———— **S. 5,** *occupancy rights, claim of, under—Proprietary rights—Inconsistent claims—Relinquishment of under-proprietary rights, effect of—Portion added to holding not insignificant part of holding, effect of.*

Occupancy rights cannot be decreed under section 5 of the Oudh Rent Act in favour of persons in whose favour is also decreed a *prima facie* claim to under-proprietary rights.

The mere fact that sub-settlement was refused with the ancestors of the appellants, does not affect their under-proprietary rights in the land held as *sir* or *nankar* but if they made a petition relinquishing all claims to the village and to *sir* and *nankar* the petition is fatal to the appellants' claim as under-proprietors but it cannot affect their claim to occupancy rights in land in which those rights have been established.

Selected Decision No. 2 of 1912 does not apply to cases where the portion added to a holding is not an insignificant part of the total, and when there is nothing to show that there has not been any alteration in the rent after it came under cultivation. **U. P. B. R.** BABOO RAM TEWARI *v.* BHAGWAN BUX SINGH **653**

———— ———— **S. 5**—'Qabzadari,' *meaning of—Right of occupancy.*

The word "*qabzadari*" in a decree made at the last Settlement is not to be invariably construed to mean *right of occupancy*. The meaning to be attached to the term must be ascertained from a careful consideration of the claim made before, and the judgment recorded by the Settlement Officer.

Where, therefore, the Settlement Officer's finding was that the appellant's ancestors were never the proprietors of the village but had been treated as proprietors on the strength of many years' possession of the village as lessees:

Held, that the appellant could not be deemed to possess a right of occupancy under section 5 of Oudh Rent Act. **U. P. B. R.** RAM DIAL *v.* BISHNATH SINGH **653**

———— ———— **S. 32 (1)**—*Application for appraisement of produce—Notice not issued, effect of—Award by* amin, *legality of.*

Where a Court receiving an application for the appraisement of produce ordered the *kurk amin* to appraise the crops without issuing to the opposite party the notice required by section 32 (1) of the Oudh Rent Act:

Oudh Rent Act—(1886)—contd.

Held, that the order of appraisement was illegal and consequently the award by the *amin* was null and void. **U. P. B. R.** MAHABIR *v.* RAMESHWAR BURE SINGH **475**

——— ——— — **ss. 33, 79**—*Tenant holding under a heritable, non-transferable lease—Enhancement or alteration of rent.*

Where a tenant holds a lease of *sir* land under a heritable but non-transferable lease, the rent of such a tenant cannot be enhanced under section 33 of the Oudh Rent Act, but it can be altered under section 79 of the Land Revenue Act at the time of Settlement. **U. P. B. R.** INDARDAWAN SINGH *v.* JAGDUTT SINGH **571**

——— ——— — **s. 55**—*Notice of ejectment—Proper rent not specified—Court-fee paid sufficient—Land from which ejectment sought, not specified—Notice, if defective.*

Where a notice of ejectment issued under section 55, Oudh Rent Act, 1886, did not specify the proper rent payable for the holding, but the Court-fee paid in respect thereof was sufficient to cover the proper and actual rent:

Held, that the notice was not defective, inasmuch as section 55 only requires that the notice shall specify the land from which the tenant is to be ejected. **U. P. B. R.** UDIT MISIR *v.* MUHAMMAD MEHDI ALI KHAN, 2 O. L. J. 298 **656**

——— ——— **s. 79** **571**

——— ——— — **s. 107A,** *applicabililty of—Land held at favourable rate of rent—Grant.*

Section 107A of the Oudh Rent Act does not apply to such lands as are held not under a grant, but in which the rate of rent is accidentally favourable to the tenant. **U. P. B. R.** RAGHUBAR *v.* THAKUR DIN **510**

——— ——— ——— **s. 107B**—*Rent-free grant—Judicial decision—Assessment of revenue.*

In a suit for assessment of revenue on a holding held rent-free in consideration of the surrender by the grantee of the previous proprietary rights there were upon record the judgments of 1865 of the Assistant Settlement Officer and Settlement Officer finding that the grantee was entitled to be maintained in rent-free possession of the land without payment of revenue:

Held, that the judgments were judicial decisions within the meaning of section 107B of the Oudh Rent Act, and that the grantee was entitled to hold the land rent-free. **U. P. B. R.** ZAIN ALI *v.* TASADDUQ RASUL KHAN **552**

——— ——— ——— **s. 107E (b)**—*Notice to resume land—Specific service not mentioned—Notice, defective, effect of.*

In a notice issued under section 107E (*b*), it is essential that the specific service which the proprietor no longer requires should be specifically mentioned, otherwise, the notice is defective and invalid. **U. P. B. R.** MAHARAJA OF BALRAMPUR *v.* PIRTHIPAL **547**

——— ——— ——— **s. 108 (5)**—*Contract Act (IX of 1872), s. 209—Agent—Accounts, suit for—Representative of deceased landlord, when can sue—Jurisdiction of Civil and Revenue Court.*

The representative of a deceased landlord can sue the agent employed by the former when alive for

Oudh Rent Act—(1886)—concld.

rendition of accounts of the period of his agency, and such a suit is cognizable by a Revenue Court. **U. P. B. R.** RAM SINGH *v.* INDER BAHADUR SINGH **679**

——— ——— ——— **ss. 108 (8), 126 (1)** **297**

——— ——— ——— **s. 126 (1)**—Lambardar *collecting rent—Right to eject.*

Where there is no specific and definite evidence on record to show that any co-sharer other than the *lambardar* collects rent of a definite portion of a holding, Selected Decision No. 2 of 1910 will not apply and the *lambardar* alone will be entitled to eject tenants by notice. **U. P. B. R.** BABU RAM *v.* JALPA SINGH **569**

——— ——— ——— **s. 129**—*Mortgage of* sir *before* 1901—*Sale of equity of redemption in* 1905—*Mortgagors minors—Ex-proprietary rights claimed by mother of minors—Mother's claim wrongly disallowed—No appeal preferred—Subsequent suit for declaration of ex-proprietary rights.*

The *sir* land in dispute was mortgaged before the passing of the Tenancy Act. In 1905 its equity of redemption was sold to one *D*, who applied for mutation in his favour. The mortgagors were four minor brothers and their mother on their behalf claimed ex-proprietary rights in the course of mutation proceedings. The Tahsildar rejected the claim in 1906, but his order was not objected to or appealed against and after that most of the land then claimed passed out of the possession of the four brothers. In 1913, two of the brothers on their own behalf as well as on behalf of the other two brothers who were still minors sued for a declaration of their ex-proprietary rights in the whole land:

Held, that inasmuch as the ex-proprietary rights arose in 1905 at the time of the sale of the equity of redemption and on their being disallowed by the Tahsildar, though wrongly, his order was not appealed against, the present claim was barred by section 129 of the Oudh Rent Act.

Obiter dictum.—Section 36 (3) is not very clear when it says that a case shall be referred to the Collector when ex-proprietary rights have been created, not where they have been claimed. **U. P. B. R.** PITAM SINGH *v.* DEBI PRASAD **675**

Partition. *See* HINDU LAW.

——— ———*Common land*—Tirni *or grazing dues payment of, by person not proprietor paying land revenue—Proprietary right, if conferred.*

The payment of *tirni* (grazing dues) by a person who is not a proprietor paying land revenue does not confer upon him any right to share in the *shamilat* or common land of a *patti*. **P. C.** BAGGA *v.* SALEH, 19 C. W. N. 1023; 29 M. L. J. 137; 2 L. W. 706 **1005**

———Co-parceners—One co-parcener in possession of house site—Proper decree **183**

———*Co-tenancy—Subordinate interest, acquisition of, by one co-tenant, effect of—Partition, meaning of.*

Where *A* and *B* are in joint possession as joint owners, each is ordinarily entitled to claim partition against the other, and it is no valid answer to a claim for partition by *A* that *B* has acquired a subordinate interest over the whole property.

Partition—concld.

Property held in co-tenancy may be partitioned by suit and the only essential is that the property sought to be partitioned is held in co-tenancy.

Partition is the process by which property held by two or more persons in co-tenancy is converted into estates in severalty and thereby divided among them, with the result that the land which before partition was held and enjoyed jointly, is after partition held and enjoyed by the different parties according to the allotments made by Court. **C.** KALI CHURN *v.* MOHANANDA DATTA **467**

——————, *entries made in course of, binding effect of—Meaning of* 'ghair maurusi 13 *years*' *and* 'khud kasht 19 *years*'.

The parties to a partition are bound by the entries made in the course of partition. The entry '*ghair maurusi* 13 years' would not mean an occupancy tenure but a non-occupancy one as the emphasis is on the nature of the tenure. Similarly, '*khudkasht* 19 years' means a non-occupancy tenure and cannot mean an ex-proprietary tenure. **U. P. B. R.** MAR ASRA CHAUDHRI *v.* BISHAN CHAUDHRI **559**

————————, *suit for—Collection of rent by one of defendants subsequent to suit—Account—Procedure—Civil Procedure Code (Act V of* 1908*)*, *s.* 47 *(*2*)*.

Where in a partition suit it is alleged that one of the defendants collected rents of houses, the subject of suit, subsequent to the suit and the application is made to include that amount in the accounts between the parties, the proper course is not to treat the application as one for execution of the partition decree, but to treat it as a suit under section 47 (2) of the Code of Civil Procedure and to levy additional Court-fee thereon and to direct the parties to submit a true and correct account of the rents and profits collected. **M.** GOVINDA CHETTY *v.* DORAISWAMI CHETTY **905**

———————— **decree**—Execution—Division by casting lots, legality of—Equitable rule **245**

Partnership. *See* CONTRACT.

———————— *Contribution, suit for—Co-partners, liability of, for debts—Contract Act (IX of* 1872*)*, *s.* 43*—Second appeal—New defence, if can be set up.*

Though partners are jointly liable to third persons a partner who pays more than his share of the partnership debt, whether voluntarily or not, is entitled to contribution from his co-partners.

Where the plaintiff and the defendants, members of a partnership firm, borrowed money in their individual capacity and were sued as such by their creditor and the decree obtained by the latter was executed not against the partnership property, but against the private property of the plaintiff alone:

Held, that the payment by the plaintiff to the decree-holder really signified that he had in substance been called upon to supply the entire capital, although the initial arrangement between the parties was that the capital should be furnished by all the share-holders in equal proportion, and that, therefore, a suit for contribution was maintainable.

In second appeal a defendant cannot be permitted to make a new case which involves the investigation of facts. **C.** LABAN SARDAR *v.* CHOYEN MALLICK, 19 C. W. N. 768 **811**

Partnership—concld.

——————, *dissolution of—Receiver, appointment of—Purpose.*

The usual way of guarding the divergent interests of the partners when they fall out is by appointing a Receiver and ordering the good-will of the business and stock-in-trade to be sold, the partners being at liberty to bid at the sale. **L. B.** DOVER, E. F. *v.* DOVER, E. S., 8 BUR. L. T. 57 **684**

————————Sale of excisable articles—Contract, legality of **480**

———————— **firm**—Acknowledgment of debt—Receiver, acknowledgment by, how far affords starting date for fresh period of limitation—Limitation Act (IX of 1908), s. 19 **27**

Party—Mortgage—Representation—*Mitakshara* family—Redemption, equity of, member of *Mitakshara* family having interest in—Failure to produce that member before Court, effect of—Transfer of Property Act (IV of 1882), s. 85, scope of **752**

Patents and Designs Act (II of 1911), ss. 26, 28—*Petition for revocation of patent—Burden of proof.*

In a petition under section 26 of the Patents and Designs Act (II of 1911) for revocation of a patent, the onus lies heavily on the petitioner to show that the respondent is not the true and first inventor of the invention. **P.** THAKAR DAS *v.* SHAH DIN, 74 P. W. R. 1915; 148 P. L. R. 1915 **904**

———————— **s. 28** **904**

Penal Code (Act XLV of 1860), s. 59 **826**

———————— **ss. 75, 59**—*Sentence—Transportation for life or for ten years.*

Under section 75 of the Indian Penal Code, the Court, if it awards a sentence of transportation, must sentence the convict to transportation for life.

In lieu, however, of such sentence it may sentence the convict to imprisonment of either description for a term which may extend to ten years, and under the provisions of section 59 of the Code, it may, in every case in which the offender is punishable with imprisonment for a term of seven years or upwards, instead of awarding sentence of imprisonment, sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which under the Code such offender is liable to imprisonment. **P.** MUHAMMAD SHARIF *v.* EMPEROR, 14 P. R 1915 CR.; 16 CR. L. J. 554; 29 P. W. R. 1915 CR. **826**

———————— **ss. 99, 141, 149**—*Right to defend immoveable property—Person in possession, whether can use force—Test of criminality—Resistance to aggressor, right of.*

Every person has a right, subject to the restrictions contained in section 99, Indian Penal Code, to defend his immoveable property.

Once a man is in possession of his own property, he is entitled to use force to defend it.

In cases where a free fight has taken place for the possession of certain property between two parties, the test of criminality is—was accused in possession or not in possession at the time when the alleged offence was committed.

Penal Code—contd.

It is no offence under section 149, Indian Penal Code, to resist an aggressor unless the aggression be in execution of the law or of some legal process.

Where the accused and his party were entitled to enter upon certain land and to reap the crop and the complainant with his party came upon the scene to remonstrate and (presumably also) to prevent them from reaping the crop, and a fight took place in which persons on both sides were injured:

Held, that the primary object of the accused party having been to retain possession of the land and to reap the crop, and not to obtain possession of any property or "to enforce any right or supposed right," they were not guilty of committing any criminal offence by the mere entry on the land or by defending the accused's property against aggression. **S.** LASHKARI KHAN *v.* EMPEROR, 8 S. L. R. 34?; 16 CR. L. J. 536 **664**

——————— **ss. 109, 352**—*Inducing others to beat without taking part—Abetment.*

A person who merely says "beat" but does not take any part himself, can only be convicted of abetment of an offence under section 352 of the Penal Code. **M.** MIR HYDER SAHEB, *In re*, 16 CR. L. J. 456 **88**

——————— **ss. 120A, 120B**—*Criminal conspiracy, person when guilty of.*

Sections 120A and 120B did not find a place in the Indian Penal Code, before the 27th March 1913, when Act VIII of 1913 became law; and, therefore, persons accused under section 120B cannot be convicted, unless the prosecution establishes that the accused were members of a conspiracy after the 27th March 1913. **C.** AMRIT LAL HAZRA *v.* EMPEROR, 21 C. L. J. 331; 19 C. W. N. 676; 16 CR. L. J. 497 **513**

——————— **s. 120B** **513**

——————— **s. 141** **664**

——————— **ss. 148, 149**—*Members of unlawful assembly—Only one member possessed of gun—Persons not in possession of any gun, offence committed by—Several offences—Acquittal of some of them—Sentence, reduction of.*

Where of the several persons charged with rioting armed with a deadly weapon only one is proved to have been possessed of a gun, it is illegal to convict others who had no such dangerous weapon of an offence under section 149 of the Indian Penal Code.

Where there has been an acquittal of the accused of some of the offences of which they were convicted, there must be a proportionate reduction in the sentences also. **M.** CHOITANO RANTO, *In re*, 16 CR. L. J. 446 **78**

——————— **ss. 149** **78, 664**

——————— **ss. 149, 302**—*Assault—Death caused by assault—Common object—Offence.*

In an attempt to rescue certain cattle from being driven to the pound one of the persons of the accused party ordered the others to use their *lathis* and beat the other party. The *lathis* were at once used with the result that one of the opponents died:

Held, that the offence was committed in furtherance of the common object of the party and each one of the accused was guilty of an offence under section 302 of the Penal Code. **A.** RASUL KHAN *v.* EMPEROR, 13 A. L. J. 470; 16 CR. L. J. 459 **91**

——————— **s. 182** **89**

——————— **s. 189** **109**

——————— **s. 209** **71**

——————— **s. 215**—*Cow lost from grazing ground—Taking money and promising to return cow, whether constitutes offence.*

In order to constitute an offence under section 215, Indian Penal Code, it is necessary that the moveable property in question should have been taken out of the possession of some person by means of an offence punishable under the Code.

Where, therefore, the complainant's cow was lost from the grazing ground and the accused took Rs. 12 from him and promised to return the cow in ten days' time, but did not do so and subsequently refused to return either the cow or the money:

Held, that as there was no proof that any offence had been committed in respect of the cow, the accused could not be convicted under section 215, Indian Penal Code. **P.** SHARFA *v.* EMPEROR, 9 P R. 1915 CR.; 16 CR. L. J. 541 **669**

——————— **ss. 217, 411**—*Police Officer retaining property found in search for theft—Property not part of stolen property—Offence—Criminal Procedure Code (Act V of 1898), s. 523—Failure to report.*

A Police constable, who retained for himself a piece of gold found in a search for stolen property but not proved to be part of the stolen property and failed to report his possession to his superior officers under section 523 of the Code of Criminal Procedure, is guilty of an offence under section 217 of the Penal Code. **M.** B. DASAPPA, *In re*, 16 CR. L. J. 453 **85**

——————— **s 283**—*Obstruction left on public road—Obstruction likely to be caused—Inference—Individual obstruction, proof of, necessity of.*

Where a *prabha* left lying in a public road could not fail to cause obstruction to any person who had occasion to pass along that road:

Held, that though obstruction to any individual was not expressly proved, it was a matter of necessary inference. **M.** VENKAPPA, *In re*, 38 M. 305; 16 CR. L. J. 560 **832**

——————— **ss. 299, 300 (3), 304**—*Murder, culpable homicide not amounting to—Injuries inflicted not sufficient but likely to cause death—Offence.*

Where the injuries proved to have been inflicted were found not sufficient in the ordinary course of nature to cause death, but quite likely to have produced death:

Held, that the offence committed did not amount to murder, but only to culpable homicide not amounting to murder. **S** DARHOON *v.* EMPEROR, 8 S. L. R. 337; 16 CR. L. J. 472 **104**

——————— **s. 300 (3)** **104**

——————— **s. 300 (3)**—*Murder — Medical opinion based on misconception of facts, value of—Injury likely to cause death.*

A Medical Officer's opinion that the injuries inflicted were not serious, which is based upon a misconception

Penal Code—contd.

of facts, should be disregarded when the evidence shows that the injuries inflicted were one inch deep and they pierced the pleura, which, in the ordinary course of events, is sufficient to cause death. **M.** PUBLIC PROSECUTOR *v.* THANDAVAN CHETTY, 16 CR. L. J. 543 **671**

——— **s. 302** **91**

——— **s. 304** **104**

——— **s. 307**—*Discharging loaded gun from short distance—Causing injuries which might have proved fatal—Offence.*

A person intentionally discharging a loaded gun at another from a short distance inflicting injuries which might have proved fatal is guilty of an offence under section 307 of the Indian Penal Code, and not merely of causing grievous hurt. **M.** PUBLIC PROSECUTOR *v.* KOLANGARET IMBICHIKUTTAM, 16 CR. L. J. 543 **670**

——— **s. 307**—*Infliction of many incised wounds on head—Inference—Murderous intent—Benefit of doubt.*

A culprit who inflicts 10 incised wounds on the body of a person, most of which are aimed at his head, must be credited with murderous intent.

Where several persons profess to be eye-witnesses standing at a short distance from the scene of the crime but fail to explain satisfactorily why none of them did not come to the rescue of the injured man, the probability is that they did not see the assault. In such a case the evidence of the complainant should be accepted with reservations and the benefit of the doubt should be given to those against whom it is not sufficiently corroborated. **P.** GAYAN SINGH *v.* EMPEROR, 13 P. W. R. 1915; 132 P. L: R. 1915 **94**

——— **ss. 323, 332**—*Excise Inspector searching house—Irregularities—Public servant—Discharge of duty—Hurt caused to Inspector—Offence.*

An Excise Inspector in searching the house of the applicant on the suspicion that he might find there cocaine committed a number of irregularities in conducting this search. He had no warrant authorizing him to make the search. He brought with him only one search witness and directed a constable to scale the outer wall of the house. The accused caused hurt to the Inspector and the constables:

Held, that the Inspector and the constables were not acting in the discharge of their duties as public servants and that, therefore, the accused were not guilty under section 332 but only under section 323 of the Penal Code. **A.** MUKHTAR AHMAD *v.* EMPEROR, 13 A. L. J. 439; 37 A. 353; 16 CR. L. J. 495 **335**

——— **s. 332** **335**

——— **ss. 337, 338**—Hakim *performing operation on eyelids—Ordinary precautions not taken—Acting rashly and negligently—Hurt—Offence*—Hakim *giving himself out as skilled operator, liability of.*

The accused, a *Hakim*, performed an operation on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. The most ordinary precautions were entirely neglected. The operation was needless and was not in accordance with any recognized Indian method:

Held, that the accused acted so rashly and negligently as to endanger human life or the personal safety of another; that as there was not the permanent privation of the sight of either eye in consequence of the operation the accused was guilty of an offence under section 337, Indian Penal Code, and not under section 338, Indian Penal Code.

Where a *Hakim* gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. **B** GULAM HYDER PANJABI *v.* EMPEROR, 17 BOM. L. R. 384; 16 CR. L. J. 437 **69**

——— **s. 338** **69**

——— **s. 352** **88**

——— **ss. 378, ills. (a), 425**—*Theft—Trees, cutting of, to annoy—Offence—Mischief.*

Theft of trees will be committed only when they were cut to remove them from the possession of the owner, and not when the cutting was merely to annoy him. The act will amount only to mischief. **M.** *In re*, KUTTIATH ODAYOTH VEETIL KOMAR NAMBIAR, 16 CR. L. J. 544 **672**

——— **s. 379**—*Accused found in possession of skin of missing goat—Charge of theft—Identification doubtful—Verdict of Jury, when can be set aside—Criminal Procedure Code (Act V of 1898), s. 307 (3).*

When the accused was found in possession of two freshly flayed skins of a goat and kid within 24 hours of the theft and was charged under section 379 of the Penal Code:

Held (*Spencer, J., dissenting*), (1) that it was absolutely necessary for the prosecution to establish that the skins found on the accused were those of the goats recently stolen;

(2) that as the prosecution witnesses had not seen the skins for more than three weeks after the theft, the Jury were not wrong in holding that the identification was suspicious;

(3) that the accused was entitled to the benefit of the doubt and ought to be acquitted.

It is not necessary to show that the verdict of a Jury is perverse and manifestly unreasonable before the High Court can set it aside, but as the Jury are Judges of fact, before their verdict is set aside, it must be established that the conclusion come to by them does not follow from the evidence recorded in the case. **M.** *In re* IRULA SADAYAN, 16 CR. L. J. 440 **72**

——— **s. 405** **671**

——— **s. 409**—*Managing Director of Bank borrowing money in his own name—Subsequent transfer of liability to Bank, whether amounts to criminal breach of trust—Adequacy of motive.*

The accused, the Managing Director of the Hindustan Bank, executed in favour of the Amritsar Bank, four *hundis* for an aggregate sum of Rs. 5,000 payable six months after date and after deducting the discount he

Penal Code—contd.

received the balance Rs. 4,772-11 and got it credited in his floating account with the Hindustan Bank. Some months before due date the accused caused entries to be made in the books of the Hindustan Bank by which the liability for re-payment on the date of maturity of the *hundis* was transferred from himself to the Hindustan Bank:

Held, (1) that the prosecution had failed to prove that the accused was guilty of the offence of criminal breach of trust;

(2) that the motive for the crime was under the circumstances of the case wholly inadequate;

(3) that the evidence on the record led to the inference that the loan was contracted *ab initio* for the Hindustan Bank for meeting immediate or prospective demands. **P** DAULAT RAI *v.* EMPEROR, 24 P. W. R. 1915 CR; 162 P. L. R. 1915; 16 CR. L. J. 54 **86**

——— **ss. 409, 477A**—*Debtor executing* hundi *in favour of Bank—Managing Director paying off his own debt in discounting* hundi, *whether amounts to criminal misappropriation—Falsification of document.*

A debtor of the Hindustan Bank executed in its avour certain *hundis* for Rs. 30,000 payable after six months. The Bank being in need of ready money the Managing Director, the accused in the case, asked the Co-operative Bank to discount the *hundis*. But the Bank refused to do so unless the Director cleared his own account with it. In order to secure ready money the accused brought forward his own son, who put in an application for a loan from the Hindustan Bank for the exact amount of the accused's debt to the Co-operative Bank. The accused sanctioned the loan as agent on the security of his own moneys in the hands of the Hindustan Bank and then cleared his debit balance with the Co-operative Bank. This transaction formed the subject of the charges under sections 409 and 477A of the Penal Code:

Held, (1) that the prosecution had failed to establish the charge of criminal misappropriation inasmuch as the accused, in his anxiety to secure ready money for his Bank, chose a method which could not be said to have injured it;

(2) that the prosecution had failed to prove that the application of the accused's son for loan and the accused's order thereon of sanction were really ante-dated and the charge of falsification of documents could not, therefore, be sustained. **P.** DAULAT RAI *v.* EMPEROR, 25 P. W. R. 1915 CR.; 164 P. L. R. 1915; 16 CR. L. J. 443 **75**

——— **ss. 409, 477A**—*Managing Director of Bank deceiving share-holders as to the real profits—Wrongful personal gain—Falsification of balance sheet—Balance sheet, whether a "writing" within the meaning of the section—Compensation to share-holders—Companies Act (VI of* 1882), *s.* 214.

Where the accused, the Managing Director of the Hindustan Bank, wishing the Bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the share-holders and the public and so to make possible a project for increasing largely the Bank's capital, on the 17th December 1912 got his son to present a pro-note for Rs. 3,000 to the Bank, treated this Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing

Penal Code—contd.

on paper to that extent his remuneration account for Rs. 4,050, which he had actually drawn, to Rs. 1,050 and thus deceiving the share-holders at their general meeting in the following March as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent. which would otherwise have been the most possible:

Held, (1) that the accused was guilty under section 409 of the Penal Code, because being entrusted with the property of the Bank, he dishonestly used and disposed of some of that property contrary to the Bank's Articles of Association causing the share-holders to declare a dividend larger than the profits warranted;

(2) that both the Managing Director and the Manager of the Head Office were guilty under section 477A of the Penal Code as they had "falsified" the balance sheet of 1912 and the books of the Bank by showing as profits Rs. 3,000 which were not profits, the falsification being nontheless complete because they had first manufactured pro-notes, etc., in order to give to the falsified balance sheet and books an appearance of correctness;

(3) that a Bank's balance sheet is a paper or writing belonging to the Bank; and

(4) that the Director was guilty of "misfeasance" "and breach of trust" and by inducing the share-holders to pay a dividend partly out of what was really capital he "misapplied" the Company's money and, therefore, could be compelled by the Court to contribute a reasonable sum by way of compensation. **P.** DAULAT RAI *v.* EMPEROR, 23 P. W. R. 1915 CR.; 167 P. L. R. 1915; 16 CR. L. J. 473 **105**

——— ——— **s. 411** **85**

——— ——— **s. 415** **65**

——— ——— ——— **ss. 420, 467**—*Current coin title to—Proceeds of cheating paid in satisfaction of debt—Right of creditors to retain money—Criminal Procedure Code* (*Act V of* 1898), *s.* 517.

Title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt due to him.

Where, therefore, during the Police investigation of a case under sections 420 and 467 of the Penal Code, it appeared that the accused had delivered over a sum of Rs. 1,168 to his creditors, this money being part of the proceeds of cheating, and the Police recovered it from the creditors:

Held, that the creditors were entitled to the money and that it must be returned to them. **P.** EMPEROR *v.* BAIJ NATH, 1 P. R. 1915 CR.; 165 P. L. R. 1915; 16 CR. L. J. 460 **92**

——— ——— **s. 425** **672**

——— ——— ——— **s. 430**—*Intention to cause wrongful loss essential—Sessions Judge dismissing appeal on reasons given in a theft case—Irregularity.*

Where an accused is charged with an offence punishable under section 430, Indian Penal Code, his intention to cause wrongful loss is the essential element to be considered.

Where the Sessions Judge dismissed an appeal against a conviction under section 340 by referring to the reason given in the judgment in a connected case, in which the accused's conviction was upheld under section 379;

Penal Code—concld.

Held, that the Sessions Judge had acted irregularly in not taking into consideraton the intention requisite for constituting an offence under section 430. **M.** INDRA TALAVAR *v.* NARASIMHA RAU, 16 CR. L. J. 542 **670**

——— **s. 456**—*Lurking house trespass—Criminal intent—Burden of proof.*

The accused who was a complete stranger was found inside the complainant's house at 2 A. M. in the morning, having entered the house by a door which the complainant had taken care to secure at night. When arrested, the accused said that he had gone inside the house in connection with an illegal intimacy with the complainant's aunt, who was a widow:

Held, that the accused was guilty under section 456 of the Penal Code.

Held, further, that as the intent with which he went inside was a matter within the knowledge of the accused, the burden of proving that his intention was an honest intention lay on him. **A** MULLA *v.* EMPEROR, 13 A. L. J. 625; 37 A. 395; 16 CR. L. J. 435 **67**

——— **s. 467** **92**

——— **s. 477A** **75, 105**

——— **s. 500**—*Defamatory statement—Publication of libel.*

The accused made certain defamatory statements against a Government Official in her petition to the Lieutenant-Governor, and on inquiry she repeated the same statements before two Magistrates on different occasions:

Held, that the statements made before the two Magistrates were the publication of the original defamatory statements made in the memorial to the Lieutenant-Governor and the accused was guilty of three separate publications of the libel. **A.** JAI DEBI KUAR *v.* EMPEROR, 13 A. L. J. 681; 16 CR. L. J. 482 **322**

——— **s. 504** **109**

Pension rules—Civil Service Regulations, Articles 458, 464, interpretation of—Officer removed from Government service, whether entitled to pension under Article 458 **252**

Pensions Act (XXIII of 1871), ss. 4, 6—*Assignment of Government revenue—Declaration—Power of Civil Court—Jurisdiction.*

A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay a grant of Government revenue to any person. **A.** SECRETARY OF STATE *v.* JWAHIR LAL, 13 A. L. J. 460; 37 A. 338 **146**

Permanent lease, *grant of, by* shebait—*Legal necessity—Limitation Act (XV of 1877), Sch. II, Art. 134, scope of—Limitation Act (IX of 1908), s. 30, applicability of—Usufructuary mortgage by* shebait, *effect of.*

The grant of a permanent lease without legal necessity is in excess of the powers of the *shebait* who grants the lease.

Article 134 of the second Schedule to the Limitation Act of 1877 only applies to the purchase of an absolute interest and not to the grant of a permanent lease.

Permanent lease—concld.

In the Limitation Act IX of 1908 the word "transferred" was deliberately inserted in place of the word "purchased", in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II, of the Limitation Act of 1877.

The grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration.

Section 30 of the Limitation Act, 1908, only applies where there is a period of limitation "prescribed," both by the Act of 1877 and the Act of 1908. Where the plaintiff cannot bring his case under section 30 the suit is barred by limitation under Article 134 of the first Schedule to the Limitation Act of 1908.

In a usufructuary mortgage of a *debuttar* property in favour of the Raja of Pachete the validity of the mortgage was not questioned:

Held, that it was not open to the *shebait* to determine, without the Raja's consent, the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him, and the receipt of rent by the Raja after the institution of the suit proved the existence of the lease at least in the mind of the Raja. **C.** RAMESHWAR MALIA *v.* JIU THAKUR, 19 C. W. N. 1082 **337**

Perpetuities, rule against. *See* TRANSFER OF PROPERTY ACT, s. 14.

Plaint, once admitted, whether can be rejected subsequently **410**

———, valid presentation of—Limitation Act (IX of 1908), s. 4—Officer authorized to receive plaints absent from head-quarters—Court, whether closed—Madras Civil Rules of Practice, r. 14, applicability of **449**

Pleadings Adverse possession and tenancy together pleaded—Inconsistent **655**

———, amendment of **223**

——— Fraud, coercion, misrepresentation and undue influence should be separately and specifically pleaded—General allegations insufficient **639**

——— Inconsistent with title alleged in complaint, if allowed **865**

——— Plea not raised in lower Courts, if allowed in further appeal **761**

Possession, constructive, if applies to wrongdoer **156**

———, *recovery of, suit for—Purchaser's duty to inquire—Civil Procedure Code (Act V of 1908), s. 66, scope and meaning of*—Benami *purchases*—Benamidar's *position and title—Real owner's powers.*

It is bad law to hold that though a purchaser is not bound to inquire whether his vendor is the *benamidar* for another man, he is bound to ascertain whether or not he is the *benamidar* of a woman.

Section 66 of the Civil Procedure Code is clearly aimed at *benami* purchases at execution-sales.

A real purchaser cannot base a suit against his *benamidar* on the fact of possession.

The clear intention of section 66 of the Code is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title. **C.** HANUMAN PERSAD THAKUR *v.* JADUNANDAN THAKUR **78**

Possession—concld.

— — ——— , *recovery of, suit for—Civil Procedure Code (Act V of 1908), O. IX, rr. 8 and 9, scope of —Former dismissal of suit, when bar to future suit.*

Where the dismissal of a suit takes place under the provisions of section 102 of the old Code (Order IX, rule 8, of the new Code), the plaintiffs are precluded under Order IX, rule 9, (section 103 of the old Code) from bringing a fresh suit on the same cause of action. **C.** KALYAN SINGH *v.* RAM GULAM SINGH **902**

— ——— — , *suit for—Party interested in the equity of redemption not made party in suit on mortgage, right of -Decree to be conditional on payment of mortgage-money.*

Where, in a suit for recovery of possession by the plaintiffs, it appeared that they, being interested in the equity of redemption in the property, were omitted from the previous suit whereby the defendants enforced their mortgage:

Held, that the defendants were not entitled to so omit the plaintiffs but that the plaintiffs could not get a decree for possession without any provision as to payment of what may be due under the mortgage to the defendants. **C.** MOHESH CHANDRA MUKHERJEE *v.* UMESH CHANDRA GHOSAL **742**

— ——— , *suit for, by person purchasing from one who had no right to sell—Judgment-debtor, right of, to remain in possession until legally evicted.*

A person in possession of land is entitled to retain possession of it until some one who can show that he has a good title sues him and gets a decree.

A judgment-debtor whose land has been sold in execution can continue in possession of it until removed by due process of law in execution of the decree. **L. B.** MOUNG TE *v.* MOUNG OH, 8 BUR. L. T. 127 **894**

Practice—*Criminal proceedings—Application for special leave to appeal—Staying execution of sentence of death—Jurisdiction.*

As the Judicial Committee of the Privy Council is not a Court of Criminal Appeal, the tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside the province of the Judicial Committee.

Their Lordships were, therefore, unable to make any order on an application to stay execution of a sentence of death while an appeal to the Board was pending. The Executive Government, if notified, would, said their Lordships, no doubt, give due weight to the fact that such an appeal was pending, and consider the circumstances, but the Board would express no opinion as to whether the sentence ought to be suspended. **P C.** BAL MOKUND *v.* EMPEROR, 19 C. W. N. 674; 17 M. L. T. 441; 21 C. L. J. 522; 17 BOM. L. R. 487; 2 L. W. 602; 16 CR. L. J. 494 **334**

——— — Duty of lower Court to follow decision of High Court **617**

——— *Order by a Judge—Successor of Judge, if bound by that order.*

An order made by a Judge is binding on his successor till set aside in due course of law. **C.** *Mohunt* GOPAL DAS *v.* RAMESWAR SINGH, 21 C. L. J. 571 **966**

— — Subordinate Court, duty of, to follow rulings of its Superior Court **709**

Pre-emption—*Finding of fact on evidence—Saharanpur District—Language of* wajib-ul-arz*—Second appeal.*

The entries in a *wajib-ul-arz* are *prima facie* to be regarded as referring to customs rather than to agreements. But this does not preclude the Court from taking into consideration, when considering the evidence as a whole, the language which is used in the *wajib-ul-arz* along with other evidence. If on a consideration of the entire evidence the Court is not satisfied that a custom exists, the finding is a finding of fact and the High Court cannot interfere in second appeal.

The High Court has never decided that a custom of pre-emption cannot exist in the Saharanpur District or that the *wajib-ul-araiz* in Saharanpur are not evidence of a custom. **A.** BARU MAL *v.* TANSUKH RAI, 13 A. L. J. 717 **1001**

— ——— ———Limitation—Starting point of prescribed period—Land in possession of vendee at date of sale—Mutation of names **146**

— — *Muhammadan Law—Demand—When second demand unnecessary—Sale in lieu of dower-debt—Consideration.*

Where at the time when the sale came to the knowledge of the pre-emptor, the vendee as well as the witnesses were present, and the pre-emptor at once claimed his right of pre-emption invoking the witnesses:

Held, that it was not necessary under Muhammadan Law for the pre-emptor to make the second demand.

A right of pre-emption arises under the Muhammadan Law even where property is transferred by a husband to his wife in consideration of dower-debt. **A.** *Musammat* NATHU *v.* SHADI, 13 A. L. J. 714 **495**

——— *Recorded co-sharer, meaning of.*

Where a person has been a recorded co-sharer in possession of a property by virtue of a sale-deed and no steps have been taken for three years to set aside the sale, or to oust him from possession, he must be regarded as a co-sharer for the purposes of a pre-emption suit. **A.** MUNNA LAL *v.* RAM GULAM SINGH **549**

— Right *given by* Wajib-ul-arz *on* rehan, *simple mortgage*, whether *rehan.*

Where a clause in the *Wajib-ul-arz* of 1875 gave a right of pre-emption in the case of "rehan" (mortgage):

Held, that the right could not be exercised if the transacion was a simple mortgage as defined in the Transfer of Property Act of 1882. **A** MARRAM KHAN *v.* SAKHAWAT KHAN **554**

——— — *Right of pre-emption mentioned in* Wajib-ul-arz*—No incidents given—Muhammadan Law.*

Where a *wajib-ul-arz* provided that a right of pre-emption existed among the owners of the *khalsa* separately and among the owners of the *milak* separately but gave no incidents of the custom of pre-emption:

Held, that the right was co-extensive with that given by the Muhammadan Law. **A.** ZAMIR AHMAD *v.* ABDUL RAZZAK, 13 A. L. J. 704; 37 A. 472 **993**

———, *suit for, maintainability of—Vendor's title—Whole property not pre-empted, effect of.*

A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle

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of pre-emption is substitution. A pre-emptor is bound to take the title which the vendee was ready to take.

A suit for pre-emption is not maintainable where the pre-emptor does not seek to pre-empt the entire property. **A.** SAHODRA BIBI *v.* BAGESHRI SINGH, 13 A. L. J. 711 **1000**

———————Wajib-ul-arz, *construction of—Rights* inter se—*Preferential claim.*

The *wajib-ul-arz* of 1833 of a village recorded the mere fact that the co-sharers had a right of pre-emption.

The *wajib-ul-araiz* of 1860 and 1869 recorded that a near co-sharer had a right of pre-emption, after him the co-sharer in the same *thok* and after him the co-sharers in other *thoks* :

Held, that the co-sharer in the same *thok* as the vendor had a preferential claim as against the vendee who was a co-sharer in a different *thok*. **A.** AUDH BIHARI PANDE *v.* JADUBANS MISIR **485**

———————Wajib-ul-arz—*Rights* inter se—*Construction*—Ek-jaddi *co-sharer—Preferential right.*

Where a *wajib-ul-arz* provided: "The right of purchase of the price, which a stranger may give, shall be prior in favour of the *ek-jaddi* co-sharer, after that with the co-sharers in the *mahal*, after they refuse the property may be sold to a stranger":

Held, that the *ek-jaddi* co-sharer had a preferential claim over a co-sharer in a the *mahal*. **A.** MUNNA LAL *v.* KALIKA BAKHSH SINGH **425**

———————Wajib-ul-arz—*Partition after preparation of* Wajib-ul-arz—*Co-sharer in one* mahal, *whether can pre-empt property in another* mahal.

A *wajib-ul-arz* gave right of pre-emption first to own brothers and nephews, and then to cousins who were co-sharers, then to co-sharers in the *patti* and then to co-sharers in the village. At the time the *wajib-ul-arz* was prepared the village was not partitioned into several *mahals*, but subsequently it was so partitioned. A co-sharer in one *mahal* sued to pre-empt property in another *mahal* where he was not a co-sharer:

Held, that he had no right to pre-empt. **A.** KHAYALI RAM *v.* KALI CHARAN, 13 A. L. J. 712 **1000**

——————— **decree**—*Vendee applying to withdraw money, whether estopped from appealing—Appeal.*

In a pre-emption suit decree was passed in favour of the plaintiff. The plaintiff deposited the money to be paid to the vendee in Court. The vendee applied to withdraw the money so deposited but did not, as a matter of fact, withdraw it :

Held, that by making the application to withdraw, the vendee did not lose his right to appeal. **A.** KHELAWAN KOERI *v.* ABDUL RAHIM, 13 A. L. J. 677 **452**

Preliminary decree, suit, if continued till final decree after passing of—Suit by executors on mortgage in favour of estate of deceased testator—Death of executors—Right of widows to be brought on record as legal representatives of deceased testator—Application under O. XXII, r. 3—Order, whether appealable **142**

Prescription—Right to ply boat—Crown grant—Ferry **692**

Presidency Banks Act (XI of 1876), s. 37, *scope of—Third parties cannot take advantage—Directors, whether agents or trustees—Security to cover future advances, whether void—Provision merely directory.*

Section 37 of the Presidency Banks Act XI of 1876, must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors of a Presidency Bank act in disregard of those powers they render themselves liable to the Bank for any loss that it may sustain by unauthorised acts. The section does not enable third parties, with whom contracts have been entered into, to deny their liability to the Bank if the Bank chooses to act upon the contract of its Directors. The action of the Directors under such circumstances will not be *malum prohibitum.*

The Directors are not identical with the Bank. They fill a double character, (1) as agents of the Bank, (2) as trustees for shareholders of the power committed to them. Whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations.

The action of the Directors in taking the security to cover future advances, although it may be in excess of their powers, is not void *ab initio.* It is open to the Bank to have accepted such contract.

If a prohibition is in the interest of the shareholders and is based on considerations of public policy it must be regarded as *malum prohibitum.*

Under the Presidency Banks Act it is not the Bank that is prohibited from taking security in regard to future advances in the shape of immoveable property, but only the Directors. Section 37 only contains instructions to the Directors as to how they should manage the business of banking.

It is well settled that where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transaction void altogether. Section 37 is only directory of the powers of the Directors. **M.** NAGAR DAMODAR *v* GUDLIMAR RAMA RAO, 28 M. L. J. 444; 17 M. L. T. 326; (1915) M. W. N. 316 **192**

Presidency Small Cause Courts Act (XV of 1882), s. 19 (s) **908**

Presidency Towns Insolvency Act (III of 1909)—*Entrustment of sovereigns and gold to jeweller—Conversion—Insolvency of jeweller—Relationship between parties constituted by transaction, nature of—Person entrusting, whether entitled to preferential payment or to rank* pari passu *with general body of creditors—Trust property, following of—Tracing and* quasi-*charge, doctrines of, if applicable.*

Where a jeweller, who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him converted the same into cash and subsequently became bankrupt and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he

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was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt:

Held, that the transaction between the claimant and the jeweller amounted to a bailment and the jeweller became, in consequence, a trustee for the claimant in respect of the sovereigns and gold entrusted to him.

Held, further, that inasmuch as there was no evidence that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the claimant was not entitled to the benefit of the doctrines of tracing and *quasi*-charge and, therefore, to any preferential payment, but was only entitled to rank *pari passu* with other creditors of the insolvent. **M.** MULRAZZU LAKSHMI *v.* OFFICIAL ASSIGNEE, 2 L. W. 312; 17 M. L. T. 247; (1915) M. W. N. 262; 28 M. L. J. 403 **37**

——————— **ss. 52, 56**—*Sale by insolvent of stock-in-trade a few days before his insolvency—Possession of goods with insolvent—Sale, validity of—Fraudulent and void transaction.*

Where the goods sold by an insolvent prior to his insolvency are allowed to remain in the shops of the insolvent, until the date of his insolvency, they are "in the possession, order and disposition" of the insolvent within the meaning of section 52 of the Presidency Towns Insolvency Act.

Where the sale by an insolvent is to a thick friend of his, only a few days before his insolvency and consideration for the sale consists of moneys borrowed both by the insolvent and the vendee from a third person, the transaction must be looked upon with great suspicion, and where the goods sold are not removed from the insolvent's premises till the date of the insolvency, the sale must be deemed to be fraudulent and void under section 56 of the Presidency Towns Insolvency Act. The fact that there were other sales by the insolvent prior to the insolvency is immaterial.

Quære.—Where the sale by an insolvent is for a sum already due to the vendee, whether the vendee could rank as a secured creditor? **M.** AHMED ALLY AND CO. *v.* OFFICIAL ASSIGNEE OF MADRAS **947**

——— —— ·——————— **s. 56** **947**

——————————— **s. 56**—*Vendee in good faith, when not—Sale, validity of—Official Assignee.*

Where a sale was made for a price appreciably lower than the real value of the property and the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor and where he conspired with the vendor to assist the vendor to defraud or delay other creditors:

Held, that the vendee was not a vendee in good faith within the meaning of section 56 of the Presidency Towns Insolvency Act;

that the sale was void as against the Official Assignee. **M.** OFFICIAL ASSIGNEE *v.* BANGY ABDUL RAZACK SAHIB, (1915) M. W. N. 332 **204**

Press Act (I of 1910), ss. 4 (1), Expl. II, 20—*Particular passages, whether to be specified in notice—Evidence—Proof—Other articles in paper, admissibility of—Disaffection to be excited must be against Indian Government—Relevancy of disaffection excited against other authorities.*

The particular passage objected to in an article need not be specified in a notice issued under section 4 (1) of the Indian Press Act, 1910.

Explanation II to section 4 of the Act does not apply to a case where the gravamen of the charge made by Government against the article is not so much that it contains 'comments' on the acts of the authorities, as that it consists of an account of certain events so inaccurate, so misleading and so unfair to those authorities as to be likely, apart from all 'comments', to excite the feelings mentioned in the notice.

Other articles from other issues of the paper containing the article in question are admissible for the purpose specified in section 20 of the Act alone, *i. e.*, 'in aid of the proof of the nature or tendency' of the said article.

The hatred and contempt and disaffection likely to be excited must be shown to be against the Indian Government, and not against the Canadian authorities or the Governor of Hong Kong, is true in a sense, but where the article complained of in giving an account of the voyage and adventures of the "Komagata Maru" and of the Budge Budge riot, aimed at literary effect and worked up to a climax by narrating the alleged oppressive conduct of Canada and Hong Kong and distinctly leaving the impression of a massacre by the Police in India of a number of unarmed and helpless man, the inaccurate and unfair statement of that conduct becomes relevant. **P.** AMAR SINGH *v.* EMPEROR, 15 P. R. 1915 CR.; 16 CR. L. J. 555; 33 P. W. R. 1915 CR. **827**

Presumption. *See* AGRA TENANCY ACT, s. 201; BURMESE BUDDHIST LAW.

——— ———Divorced woman remains unmarried until proved to be married **194**

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——— ———Submerged lands, possession of **156**

——— ——— ——Tanks in villages, ownership in—Entry in papers on basis of possession—Evidence of permission to make tanks—Burden of proof **11**

——— ——— Tenant goes away on pilgrimage—Cousin cultivates and manages holding—Tenant does not return—Presumption of death—Co-sharing explained — Co-sharing possible, though tenant absent **427**

——————Will not produced **807**

Primogeniture, law of—Oudh *taluqa* **651**

Principal and agent—*Joint property of brothers—Some brothers taking management of property—Relation created—Managers, duty of—Government Revenue, payment of, if for upkeep of estate.*

Where by agreement two of the five brothers agreed to take over the management of their joint property for a period of five years for the improvement and upkeep of the estate:

Held, that the relationship of principal and agent created by the agreement must not be overlooked and that the managers are under a legal duty to exercise reasonable care and diligence in the management of the estate.

A payment on account of the Government revenue of an estate is a payment for the upkeep of the estate. **C.** AMBICA CHARAN DAS *v.* HARINATH DAS **905**

———————Kabuliat *hypothecating property for defalcation executed by agent—Dismissal of agent—Re-appointment, defalcation after—Limitation Act (IX of* 1908), *Sch. I, Art.* 89, *applicability of.*

In a suit for accounts by the principal against his agent, a *kabuliat* was executed in 1305 B. S. by an agent in favour of his principal to the effect that certain immoveable property hypothecated therein would be answerable for any defalcation made by the agent or any damages suffered by the principal through his negligence. The agent was dismissed in 1306 but he was re-appointed in 1307:

Held, that his position in 1307 was not governed by the *kabuliat* of 1305 but that by the ordinary rules applicable between the principal and the agent, and that Article 89, Schedule I, of the Limitation Act, applied to the suit. **C.** BEHARI LAL ROY *v.* HARA KUMAR DUTTA, 21 C. L. J. 458 **748**

———— ———— Receipt of money after termination of agency—Money had and received **986**

———— ———— *Suit for accounts—Agreement—Immoveable property, hypothecation of—Transfer to wife—Re-transfer—Agent manager of properties—No demand—Suit within three years—Limitation Act (IX of* 1908), *Sch. I, Art.* 89—*Principal, right of.*

Where an agency was created on the 24th May 1896, for the management of a certain immoveable property, and in 1897 the principal transferred the property to his wife and two years later the wife re-transferred it to her husband, but the agent, continued to manage it as if no transfer had been effected and the agency was finally terminated in 1910, and the present suit was commenced on the 22nd March 1911 for accounts in respect of the years 1306 to 1317:

Held, that Article 89, Schedule I, of the Limitation Act, was applicable to the suit and that in the absence of any demand and refusal during the continuance of the agency as the suit was instituted within three years from the date of the termination of the agency, the plaintiff was entitled to the accounts claimed. **C.** SURES KANTA BANERJEE, *v.* NAWAB ALI SIKDAR, 21 C. L. J. 462 **848**

Privy Council appeal. *See* CIVIL PROCEDURE CODE, 1908, s. 110; LEAVE TO APPEAL TO PRIVY COUNCIL.

Probate—*Partial revocation, when allowable—Co-executor appropriating large portion of sale-proceeds of property—Liquidation of testator's debts—Probate and Administration Act (V of* 1881), *s.* 50.

The fact that a co-executor appropriated as legatee the whole or major portion of the sale-proceeds of a part of the estate before liquidating the testator's debts as provided in the Will is not sufficient to a partial revocation of the Probate as regards one of the executors, where the remaining assets far exceed the liabilities and particularly where none of the creditors has come forward to object to the acts of the said co-executor. **P.** ISHWAR SINGH *v.* HARKISHEN LAL, 84 P. W. R. 1915; 179 P. L. R. 1915 **754**

Probate and Administration Act (V of 1881), s. 4 **139**

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———— ———— ———— **s. 50**—*Civil Procedure Code (Act V of* 1908), *ss.* 114, 151—*Inherent power of Court to set aside order made under Probate and Administration Act—Procedure—Notice—Person interested in estate of deceased*—Zemindar, *right of.*

An order granting Letters of Administration to a particular person should not be cancelled without giving him notice.

It is open to a District Judge to re-consider an order granting Letters of Administration, whether under the provisions of section 114 or under the inherent powers of the Court recognized by section 151 of the Code of Civil Procedure, apart altogether from the provisions of section 50 of the Probate and Administration Act itself.

A Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir or one of the heirs of the deceased, has such an interest. A creditor also has an interest. **A.** PARMA *v.* NEK RAM, 13 A. L. J. 441; 37 A. 380 **133**

———— ———— ———— **s. 58**—*Application for Letters of Administration with Will annexed—Heirs in existence—Government, whether has* locus standi *to oppose grant—Confidential proceedings, legality of.*

An application for Letters of Administration with the Will annexed was filed before the District Delegate and upon an objection being made by a third party, the case was sent up to the District Judge and taken up as a contested case. In the meantime the Chairman of the local Municipality made a report to the Sub-Divisional Officer that the Will was forged, whereupon the latter took some "confidential" proceedings and sent the record to the Collector asking him to oppose the grant of the Probate, who did so on behalf of Government:

Held, (1) that the "confidential" proceedings of the Sub-Divisional Officer were not in accordance with law;

(2) that at the inception of the proceedings the Government had a *locus standi* in the matter but that as soon as it appeared that there were "heirs" in existence, the Government ought to have retired. **C.** RAMA NATH CHAKRAVARTI *v.* COLLECTOR OF KHULNA **682**

———— ———— **s. 92** **139**

Probate and Administration Act—concld.

——————— **s. 92**—*Provision in Will that majority of executors should act—Contract by some executors, whether binds estate.*

Section 92 of the Probate and Letters of Administration Act has no application, where a Will overrides it and provides that it is only the opinion of the majority of the executors appointed under it that should bind the estate.

A contract, in such a case, entered into by some of the executors only without reference to the others will not, therefore, bind the estate of a deceased testator. **M.** ERA DODDA BASAPPA *v.* RAMA REDDI, **505**

Procedure. *See* CIVIL PROCEDURE CODE, O. IX, r. 8.

——————Execution sale - Occupancy holding not saleable—Sale held before application of objection heard—Irregularity—Proper procedure **616**

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——————Civil Procedure Code (Act V of 1908), O. XXI, r. 58—Mortgage-decree - Attachment of property—Claims, investigation of **941**

——————Mortgage-deed not attested by two witnesses—Invalidity of mortgage—Pleas raised in course of trial but not in pleadings—Court, duty of **991**

——————Order under section 146, Criminal Procedure Code, without taking evidence, if final **66**

——————Partition, suit for—Collection of rent by one of defendants subsequent to suit—Account **905**

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——————Summons case tried together with warrant case—Procedure to be followed—Warrant case dismissed during trial—Summons case proceeded with—Right of accused to re-call and cross-examine prosecution witnesses—Right to re-call and cross-examine—Right refused—Prejudice—Burden of proof **668**

Proceedings, revival of, after death of complainant **98**

Process-server, right of, to enter any house without permission **109**

Professional ethics—*Counsel appearing in a cause—Propriety of his giving evidence.*

Though it is no doubt desirable that Counsel ought not to appear in a case where it is probable that his evidence would be material, there is no inflexible rule that his evidence ought not to be taken, if at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice. **M.** LODD GOVINDOSS *v.* RUKMANI BHAI, 17 M. L. T. 382 **135**

Promissory note, maker of, liability of—Continuing security — Indorsements, effect of—Fraud, person liable for **936**

——————, *sale of—Purchaser bound to make enquiries of executant*—Caveat emptor.

A person buying a promissory note must know that he is buying a mere claim and must make enquiries before buying. **P.** KISHEN SARUP *v.* TARA CHAND, 76 P. W. R. 1915; 150 P. L. R. 1915 **887**

—— ——— ——— *suit on—Amount claimed not found to have been actually advanced—Suit, if to be decreed for amount found.*

In a suit for recovery of the sum of Rs. 40 alleged to have been advanced on a hand-note with interest, the Judge found that the sum of Rs. 30, and not Rs. 40, was really advanced by the plaintiff to the defendant, but dismissed the suit on the ground that the plaintiff had failed to prove the advance of Rs. 40 claimed:

Held, that judgment ought to have been entered in favour of the plaintiff for the amount found to have been actually advanced. **C.** BENODE BEHARI PATRA *v.* JANKI KALWAR **468**

Proprietary title, *question of—Issue not decided—Appeal, whether lies to District Judge—Onus on wrong party—Finding based on no evidence—Revision, grounds for.*

Where an issue which affected the claim to proprietary right under section 158 was decided neither by the Assistant Collector nor by the Commissioner:

Held, that no appeal lay in the case to the District Judge.

The mistaken view that the burden of proof is on the defendant to show that the land should not be resumed and a finding arrived at without any evidence to support it constitute a gross and palpable error of law in justifying interference in revision. **U. P. B. R.** NARAIN DAS *v.* MIR KHAN **61**

Provincial Insolvency Act (III of 1907), s. 4 (b)—*Collusive suit—Subsequent withdrawal—Act of insolvency.*

A collusive suit and subsequent withdrawal from or compromising of the same, with the express object of putting another party in possession of immoveable property, amounts to a transfer of property by an insolvent within the meaning of clause (*b*) of section 4 of the Provincial Insolvency Act, 1907. **A.** PURAN NATH *v.* ATWARGIR, 13 A. L. J. 434 **217**

——————— **s. 15 (1),** *scope of—Petition presented by the debtor—Dismissal on the ground of bad faith—Material irregularity.*

The concluding portion of sub-section (1) of section 15 of the Provincial Insolvency Act of 1907 refers only to cases in which the application has been made by the creditor and is opposed by the debtor.

Where, therefore, an insolvency petition presented by a debtor was dismissed under section 15 (1) of the Act, on the ground that the petitioner had been guilty of bad faith in having given undue preference to some of his creditors over others:

Held, that the District Judge acted with material irregularity in the exercise of his jurisdiction in dismissing the petition upon that ground. **P.** RATTAN MALIK *v.* TIRATH RAM, 28 P. R. 1915 **361**

——————— **s. 16 (2) b)** **30**

——————— **ss. 20, 22**—*Sale held by Receiver—Conditions of sale changed just before sale—Application to Court by creditor to set aside sale—Power of Court to set aside sale—'Person aggrieved,' meaning of.*

Provincial Insolvency Act—contd.

An Official Receiver, in whom the property of an insolvent vested under an order of adjudication, issued a proclamation for sale of certain properties, subject to two mortgages subsisting thereon. On the date fixed for the sale he varied the sale proclamation by noting that the properties would be sold free of the mortgages, and sold the properties accordingly. The respondent, a creditor of the insolvent, put in an application to the District Court to set aside the sale, on the ground that the action of the Receiver in varying the sale proclamation was irregular and that by reason of the irregularity the properties had fetched a very low price:

Held, that the Court had jurisdiction to set aside the sale inasmuch as under section 22 of the Provincial Insolvency Act it had an unfettered discretion to set aside any order passed by an Official Receiver.

Though a Court does not ordinarily interfere with an order passed by a Receiver in the exercise of his discretion, it will do so where proper reasons are shown that the action of the Receiver was irregular and has prejudiced the interests of the creditors.

Any person who is entitled to demand a decision of the Court in respect of the property of an insolvent and would be damnified if the decision goes against him, is a person aggrieved within the meaning of section 22 of the Insolvency Act. **M.** THIRUVENKATA CHARIAR *v.* THANGAYI AMMAL, 17 M. L. T. 432 **294**

——————— **s. 22** **294**

——————— **s. 31**—*Secured creditor, meaning of—Agreement appointing creditor sole agent for sale of debtor's goods—Sale-proceeds to be paid to creditor.*

Where an agreement was entered into between a debtor and his creditor whereby the latter was appointed the sole agent for the sale of all books already published or thereafter to be published by the debtor with a condition that the sale-proceeds, after deducting the commission, was to be credited towards the discharge of the debt:

Held, that the creditor was entitled to be regarded as a secured creditor.

Secured creditor means a person holding a mortgage, charge, or lien upon property of the debtor or any part thereof as security for the debt due to him from the debtor. **A.** ALLAHABAD TRADING AND BANKING CORPORATION *v.* GHULAM MUHAMMAD, 13 A. L. J. 521; 37 A. 383 **263**

——————— **s. 34**—*Property attached but not sold before adjudication, effect of—Receiver, powers of.*

Section 34 of the Provincial Insolvency Act was intended to put creditors of an insolvent, who have not actually attached the property before the date of the order of adjudication in at least as good a position as creditors of the insolvent who, but for his insolvency, would have been entitled to claim a rateable distribution of the assets received on an execution sale.

A creditor instituted a suit against his debtor and attached his property before judgment. Subsequently the debtor was adjudicated insolvent. After the order of adjudication, the creditor who had attached the property proceeded to sell the property in execution of his decree. The Receiver objected and claimed the property for the general body of creditors:

Held, that the property not having been sold before adjudication was still the property of his insolvents and as such was available to the general body of creditors. **A.** KASHI NATH *v.* KANHAIYA LAL SHARMA, 13 A. L. J. 700; 37 A. 452 **990**

——————— **s. 36**—*Burden of proof—Transferee to prove good faith and valuable consideration.*

Section 36 of the Provincial Insolvency Act lays the onus upon the transferee to prove that the transfer made by an insolvent was made in good faith and for valuable consideration. **C.** NILMONI CHOWDHURI *v.* BASANTA KUMAR BANERJEE, 19 C. W. N. 865 **814**

——————— **s. 37 (1),** *scope of—Transfer of property or any interest therein—Preference, fraudulent—Burden of proof—Dominant view—Proper test—Disposition, voluntary—Debtor's state of mind—Good faith no protection to creditor.*

Before a transfer by a debtor of any interest in his property is avoided under section 37 (1) of the Provincial Insolvency Act, four conditions must be fulfilled, namely *first*, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; *secondly*, the transaction must be in favour of a creditor or of some person in trust for a creditor; *thirdly*, the debtor must have acted with the view of giving such creditor a preference over his other creditors; and *fourthly*, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought o be impeached.

Where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so.

In the determination of the question whether a person is able or unable to pay his debts, as they become due, from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts, is immaterial.

A particular transaction in favour of a creditor may be set aside as a fraudulent preference only if it is proved that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors.

The proper test to ascertain the dominant view is the question, "was the act done voluntarily"?

A voluntary disposition is an act moving from the debtor spontaneously.

The use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure.

In every case the state of mind of the debtor is the paramount consideration.

Under section 37 of the Provincial Insolvency Act (which is substantially identical with section 48 of 46 & 47 Vict. c. 52), good faith on the part of the creditor affords him no protection where

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the intention of the debtor to give him a preference is established, although sub-section (2) of section 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent. **C.** NRIPENDRO NATH *v.* ASHUTOSH GHOSH, 19 C. W. N. 157; 21 C. L. J. 167 **128**

——— ——— ——— **s. 42**—*Annulment of adjudication, when and when not allowed.*

An adjudication can be annulled only under section 42 of the Provincial Insolvency Act when the conditions mentioned therein are fulfilled.

A Court while annulling an adjudication must find that the adjudication could not legally or properly have been made on the facts as existing at the time of the adjudication. Subsequent misconduct on the part of a petitioner should not lead to annulment of the adjudication.

An adjudication cannot be annulled because:

(*i*) the petitioner could subsequently pay his debts in full out of his assets;

(*ii*) a part of his property is subject to the Alienation of Land Act;

(*iii*) the debtor since his adjudication has not been giving any produce of his lands to the Receiver, or

(*iv*) he has not made over all his assets to the Receiver **P.** JAM KHAN *v.* DEVI DITTA, 77 P. W. R. 1915; 152 P. L. R. 1915 **888**

——— ——— ——— **s. 43**—*Receiver's report as to fraud of insolvent, admissibility of, in evidence.*

The report of a Receiver of an insolvent's property to the effect that the insolvent had fraudulently transferred his property to his wife before declaration of insolvency, is not admissible in evidence to convict the insolvent under section 43 of the Insolvency Act. **A** NAND KISHORE *v.* SURAJ MAL, 13 A. L. J. 642; 37 A. 429 **998**

——— ——— ——— **Sch. II, art. 42** **247**

Provincial Small Cause Courts Act (IX of 1887), s. 25 **846**

——— ——— ——— **s. 25**—*Jurisdiction—No objection taken before lower Court—High Court, discretion of, to interfere.*

A revision application based mainly on the ground that the Small Cause Court had no jurisdiction to try the suit, an objection which was never taken in the lower Court, has no merits and the High Court will not interfere. **C.** NATIONAL INSURANCE AND BANKING CO. *v.* BISWAMBAR CHOWDHURY **566**

——— ——— ——— **s. 37**—*Small Cause suit—Transfer of case to regular side—Decision—Appeal, maintainability of.*

A suit of a Small Cause Court nature was filed before a Munsif, who had the powers of a Small Cause Court Judge, and was registered as a Small Cause Court suit. Subsequently the Munsif was succeeded by an officer who had no Small Cause Court powers. The latter officer ordered the case to be transferred to the regular side and tried it as a regular suit. An appeal against his decision was dismissed on the ground that no appeal lay:

Held, that an appeal did lie **A.** SARJU PRASAD *v.* MAHADEO PANDE, 13 A. L. J. 639; 37 A. 450 **996**

Provincial Small Cause Courts Act—contd.

——— ——— ——— **Sch. II, art. 13**—*Suit by* malguzar *to recover value of manure under* Wajib-ul-arz—*Small Cause—Second appeal, if competent.*

The plaintiffs, *malguzars* of a certain *mauza*, sued to recover from the defendant a sum of Rs. 34, on account of the wrongful removal of manure to which they set up title under a clause of the *Wajib-ul-arz*, which ran as follows:—

'In this village the *malguzar* takes according to long custom the manure of those who have no fields of their own: in return he shall allow them free grazing and *nistar*:

Held, that a second appeal in this case was barred under section 102 of the Code of Civil Procedure, as the suit was of a nature cognizable by a Court of Small Causes, because

(*a*) it was one for damages consequent on the wrongful removal of manure to which the plaintiffs were entitled, and not for delivery of that manure, or

(*b*) even if the claim were regarded as one for the manure itself as a 'due' within the meaning of that term as used in Article 13 of the second Schedule to the Provincial Small Cause Courts Act, 1887 that 'due' was not payable to the plaintiffs by reason of their interest in immoveable property.

The dues contemplated by Article 13 are payments to which a person is entitled as representing his interest in certain immoveable property, and not because he possesses some interest in immoveable property. **N.** JAIRAM *v.* DOMA, 11 N. L. R. 100 **815**

——— ——— ——— **Sch. II, arts. 15, 16**—*Suit for recovery of balance of mortgage-money, whether maintainable in Small Cause Court—Damages for breach of contract.*

A suit by a mortgagor for the recovery of the balance of the mortgage-money not paid to him, being a suit for the specific performance of so much of an agreement as has not already been performed, does not lie.

Such a suit or a suit for the rectification of the instrument is not cognizable by a Court of Small Causes.

It is, however, open in such circumstances to the plaintiff to sue in the Small Cause Court for damages for breach of contract provided the damages are within the pecuniary jurisdiction of the Court. **C** SHAIK GALIM *v.* SADARIJAN BIBI, 21 C. L. J. 532; 19 C. W. N. 1332 **621**

——— ——— ——— **art. 16** **621**

——— ——— ——— **arts. 41, 42**—*Decree on mortgage—Payment by one co-mortgagor—Suit for contribution—Jurisdiction.*

A suit by one co-mortgagor against the other co-mortgagors for contribution in respect of money paid by him to discharge a decree obtained on their joint mortgage is not cognizable by a Small Cause Court. **A.** TALAIMAND SINGH *v.* GOBIND SINGH, 13 A. L. J. 694 **247**

——— ——— ——— **art. 42**—*Suit for compensation—Jurisdiction.*

M and *R* mortgaged a property belonging to *H* for their own purposes. The mortgagee obtained

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a decree. *H* paid off the decree to save his property and subsequently sued *R* alone to recover the money:

Held, that the suit was for compensation for an impudent wrong committed against *H* by *M* and *R* and was cognizable by a Small Cause Court.

Held, further, that *M* was not a necessary party to the suit, as each of the two executants of the mortgage was jointly and severally responsible to recompense the plaintiff. **A.** RAZA HUSAIN *v.* HASAN JAN, 13 A. L. J. 632 **245**

Public highway, *right of user of—Religious procession, carrying of—Civil right—Special damages if necessary to maintain action—Injunction, grant of—Civil Procedure Code (Act V of 1908), O. I, r. 8—Amendment.*

Every citizen has an inherent right to conduct religious processions through the public streets. This natural right may be restricted in the interests of public safety or its exercise may be limited, so that it may not infringe rights of property possessed by others, and the burden lies upon those who claim to impose fetters upon the exercise of such rights to establish the limitation.

The right of every citizen to pass through public streets in procession is a civil right.

Where the suit is by a headman to declare the right of his community to pass through public streets in procession and where that right is denied, he can maintain a suit without alleging special damage to himself.

An original defect in the plaint can be cured by a subsequent order of amendment.

Where an injury is of such a character that pecuniary compensation will not afford sufficient relief or where it is necessary to avoid multiplicity of judicial proceedings, an injunction will be granted.

In cases where an actual offence is threatened, it is not necessary that recourse must be had to the Criminal Courts before seeking redress in the Civil Courts. **M.** ANDI MOOPAN *v.* MUTHUVIRAMA REDDY, 17 M. L. T. 453; 29 M. L. J. 91 **248**

Funjab Alienation of Land Act (XIII of 1900), s. 3 **751**

——————— **s. 9 (2), (3)**—*Mortgage by way of conditional sale—Mortgagor denying execution or pleading payment—Deputy Commissioner, whether can decide question of currency of mortgage.*

Where a holder of a mortgage by conditional sale applies direct to the Deputy Commissioner under section 9 (2) of the Punjab Land Alienation Act or where a mortgage by way of conditional sale is referred to a Deputy Commissioner by a Civil Court under section 9 (3) of the Punjab Land Alienation Act and the mortgagor on appearing before the Deputy Commissioner denies execution of the mortgage or pleads payment of the mortgage-debt, the Deputy Commissioner must decline to exercise the power conferred on him by section 9 (2) of the Act. **P.** LAKHMI DAS *v.* HAYAT, 2 P. R. 1915 REV.; 3 P. W. R. 1915 REV. **502**

Punjab Courts Act (IV of 1912), s. 41 (1) (a) **801**

——————— **s. 41 (1) (c)**—*Second appeal—Finding of fact—Substantial error in procedure—Court overlooking material evidence—Consideration—Legal necessity.*

A finding of fact arrived at by a lower Appellate Court can be assailed on second appeal only where it appears that in giving its decision the lower Appellate Court has not taken into consideration material evidence on the record and other material circumstances connected with the case.

In cases of old mortgages, where mortgagors have had subsequent opportunities of asserting want of consideration but expressly and impliedly admitted receipt of it in full, Courts will not expect mortgagees to give the same precise proof of payment and 'necessity' as in cases in which the transactions are of recent date. **P.** RANZOR SINGH *v.* GAYAN, 114 P. L. R. 1915 **785**

Punjab Courts Act (III of 1914), s. 41 (1) (c) **901**

Punjab Government Tenants Act (III of 1893)—*Re-grant of lapsed occupancy tenancy by Revenue Officer—Civil Court, whether can interfere.*

The Civil Courts have no jurisdiction to interfere with the arrangements made by the Revenue authorities in the matter of the re-grant of a lapsed occupancy tenancy which is covered by the Government Tenants Act, III of 1893. **P.** KESAR SINGH *v. Musammat* DAYALI, 38 P. R. 1915; 102 P. W. R. 1915 **570**

Punjab Land Revenue Act (XVII of 1887), ss. 115, 116—Wajib-ul-arz *prohibiting partition of* shamilat, *whether operates as a bar—Revenue Officer, duty of, to decide.*

An entry in the *Wajib-ul-arz* prohibiting the partition of *shamilat* lands does not necessarily operate as a bar, it being the duty of the Revenue Officer dealing with the partition to decide whether such a clause should prevail or not.

Where the *Wajib-ul-arz* of a village was drawn up to suit a time when the land was valued only for its pasture, but the land had since been broken up for cultivation and there had been a considerable reduction in the number of cattle kept by the community:

Held, that as the conditions had changed and a large section of the community contested the *Wajib-ul-arz*, the Revenue Officer was justified in sanctioning partition. **P.** LAKHI *v.* DOST MOHAMMAD KHAN, 1 P. R. 1915 REV. **498**

——————— **s. 116** **498**

Punjab Municipal Act (XX of 1891), s. 195—*Building erected in contravention of sanction—Notice to demolish building—Injunction against Municipality—Right of Court to interfere.*

The plaintiff sued for an injunction against the Municipality to restrain them from interfering with the *chabutra* erected by the plaintiff. The *chabutra* was admittedly constructed by the plaintiff in contravention of the sanction of the Municipality. It was argued for the plaintiff that the building as erected was in point of fact more advantageous to the public than would be the building as sanctioned. The contention was disallowed and the suit was dismissed:

Punjab Municipal Act—concld.

Held, that no second appeal lay in the case and the Courts were not competent to entertain the contention of the plaintiff. **P.** HARJI MAL *v.* MUNICIPAL COMMITTEE, DELHI, 107 P. L. R. 1915; 67 P. W. R. 1915 **766**

Punjab Pre-emption Act (II of 1905), ss. 10, 19—*Money deposited in Court by plaintiff-pre-emptor, attachment of—Liability of plaintiff to pay up deficiency.*

The plaintiff-pre-emptor deposited Rs. 400 in Court under section 19 of the Punjab Pre-emption Act of 1905, but during the pendency of the suit Rs. 297 were, without the knowledge of the parties to the suit, withdrawn under an attachment at the instance of a person who had a decree against the plaintiff. The suit being decreed in favour of the plaintiff, he paid in the balance of the price fixed over and above Rs. 400, but was ordered to pay Rs. 297 more before getting possession:

Held, that under section 10 of the Act the money deposited by the plaintiff could not be attached, but as he had presumably benefited by Rs. 297 being paid over to one of his creditors, he was in equity bound to make good the deficiency. **P.** PANNA LAL *v.* NATHA SINGH, 27 P. R. 1915 **354**

——— **s. 19** **354**

——— **s. 22 (2),** *proviso, applicability of.*

The proviso to sub-section (2) of section 22 of Act II of 1905 is not applicable to a case, in which the price does not consist mainly of a debt greatly exceeding in amount the market-value of the property. **P.** FATEH CHAND *v.* GANDA MAL, 72 P. L. R. 1915; 94 P. W. R 1915 **150**

Punjab Tenancy Act (XVI of 1887), ss 77, 100—*Punjab Tenancy (Amendment) Act (III of 1912)—Jurisdiction of Civil and Revenue Courts*—Panahi *tenant, right of, to establish occupancy right.*

Act III of 1912 does not set up any bar to action under section 100 of the Tenancy Act.

A *panahi* tenant (protected for a term of years) is not debarred from establishing occupancy rights under the Tenancy Act, 1886. **P.** WADHAWA *v. Musammat* HASSI, 111 P. L. R. 1915; 64 P. W. R. 1915 **778**

——— **s. 100** **778**

Punjab Tenancy (Amendment) Act (III of 1912) **778**

Railway—*Goods consigned—Indemnity bond—Risk note form A—Goods, shortage of—Liability of Railway Company—Right of consignee.*

Where the sender of goods through a Railway Company signs "risk note form A", he indemnifies the Company and makes it free from all responsibility for the condition into which the goods may be delivered to the consignee at destination and for any loss arising from the same. The consignee, however, is entitled to have the consignment weighed on the spot in the presence of some respectable servant of the Railway Company and it is the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this operation. If the Railway servants do not allow the consignee to have the goods weighed at the time of delivery and thus let them remain lying in the Railway go-down to the detriment of the consignee, the Company is liable in damages.

A risk note in form A is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee who is entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. **A.** ROHILKHAND AND KUMAUN RAILWAY CO. *v.* ISMAIL KHAN, 13 A. L. J. 417 **207**

Railways Act (IX of 1890), ss. 47 (1) (f), 72—*R. (2) of rules framed under s. 47—"Delivery to be carried by Railway", meaning of—Commencement of Company's liability, whether dependent upon issue of receipt.*

A "delivery to be carried by Railway" means something more than a mere depositing of goods on the Railway premises; it means some sort of acceptance by the Railway, a taking as well as a giving.

The commencement of the liability of a Railway Company for goods delivered to be carried under section 72 is in no way dependent upon the fact of a receipt having been granted and must be determined on the evidence in the case quite independently of rule 2 under section 47, sub-section (1), clause (*f*). **B.** RAMACHANDRA NATHA *v.* GREAT INDIAN PENINSULA RAILWAY, 17 BOM. L. R. 496; 39 B. 485 **545**

——— **s. 72** **545**

Rateable distribution. *See* CIVIL PROCEDURE CODE, s. 73.

Receiver, *appointment of—Grounds—Poverty or insolvency, if grounds—Civil Court, jurisdiction of, to interfere in Magisterial proceedings under s. 145, Criminal Procedure Code—Management or malversation—Discretion of lower Court—Appellate Court, power of, to interfere.*

A Civil Court has jurisdiction to come to a different conclusion from that of a Magistrate under section 145, Criminal Procedure Code, but it has no right to sit in judgment over the finding of fact arrived at by the Magistrate, by a review of the evidence produced before the latter.

Poverty or insolvency of the defendant is no ground for the appointment of a Receiver unless there be in addition some danger to the estate.

Where no specific acts of mismanagement or malversation are proved against a defendant in possession, the Courts must be very slow to displace a party rightfully in possession by the appointment of a Receiver.

Where *prima facie* the title to the property in dispute is in him who is in possession of the property, his possession cannot be displaced by the appointment of a Receiver pending a suit before a Court.

As a rule, an Appellate Court will not interfere with the discretion of the lower Court ordering the appointment of a Receiver; but where the lower Court has based its order on a wrong view of the facts, it is the duty of the Appellate Court to interfere and set it right. **M.** SIVAJI RAJA SAHIB *v.* AISWARIYANANDAJI SAHIB, 29 M. L. J. 209; 18 M. L. T. 155 **485**

Receiver—concld.

——— ———, appointment of—Partnership, dissolution of—Purpose **684**

——— ———, order providing for appointment of—Appeal **504**

Recorded co-sharer. *See* AGRA TENANCY ACT, s. 201.

Rectification of sale-deed. *See* SALE-DEED.

Redemption. *See* AGRA TENANCY ACT, s. 158; MORTGAGE.

Reference. *See* CRIMINAL PROCEDURE CODE, s. 439.

Registration—*Receipt containing agreement to accept rent-deed, whether compulsorily registrable.*

A document which, besides being a receipt for money paid, contains an agreement to accept a rent-deed is an agreement to lease and is inadmissible in evidence without registration. **M.** SREEKISAN PITTY *v.* KOTA NAMALWARAYYA **246**

Registration Act (XVI of 1908)—*Deed in possession of mediators—One of the parties capable of presenting it for registration—Other party, when liable.*

Where a document is in the possession of mediators and could have been obtained and presented for registration by one of the parties, he cannot hold the other party liable unless the non registration was not due to any default on his part **M.** PONNUSAWMY MUDALIAR *v.* MUTHUSAWMY MUDALIAR **585**

——— ——— ——— **s. 17 (2) (i)**—*Civil Procedure Code (Act V of* 1908), *O. XXIII, r.* 3—*Compromise of suit*—Razinama, *if requires registration—Evidence, admissibility of* razinama *in.*

A *razinama* presented to a Court setting forth the terms on which the parties had come to terms does not require registration and is as such admissible in evidence. **P** *Musammat* JEO *v.* JAIMAL SINGH, 90 P. W. R. 1915 **311**

Registration law, fraud on—Sale by registered instrument or by delivery of possession—Bond, where to be registered—Intention to sell or mortgage, want of **413**

Regulation XI of 1825, s. 4—*By gradual, slow and imperceptible means—Burden of proof—Small villages—Small river—Large accretions, if by gradual, slow and imperceptible means—Adverse possession—Land under water for certain period*—Vis major—*Possession during such period—Presumption.*

Where the question is of the manner in which land has been cut away from one village and thrown up on the other side of the river, the burden of proof is on the party who claims the accretion to show that the accretion to his tenure has been of the nature contemplated by the law as laid down in Regulation XI of 1825 and unless he can prove this satisfactorily, he cannot be said to have proved his title.

Where the villages are small in area and their common boundary but short in length and where there is a small river, shallow and fordable, which at one season of the year is liable to sudden floods cutting away a portion from the small estates:

Regulation—(XI of 1825)—concld.

Held, that under the circumstances the accretions of a few *bighas* per annum can hardly be said to be by gradual, slow and imperceptible means as contemplated by the Regulation.

A person cannot be said to have acquired a title by prescription to a land which remains covered with the flood water of a river for a certain period every year, as he must be deemed to have been dispossessed by *vis major* during the time of flood and as under law the possession during flood time is in the person who has title. **A.** BALDEO THAKURAI *v.* UGRA NATH **278**

Religious procession. *See* PUBLIC HIGHWAY.

Rent, *suit for*—Kabuliat, *construction of—Enhancement, no question of.*

Where on the face of a document which was to have effect for three years, it appeared that the rent fixed was a certain amount but that the landlord allowed a certain amount to be held in abeyance for three years, and for those three years, year by year a certain amount was to be paid by the defendant according to the instalments mentioned, and where the landlord sued for the arrears:

Held, that what the plaintiff sued for was not enhancement, no more than if a landlord gave a receipt for half the rent for the first year, half the rent for the second year, and half the rent for the third year, and subsequently sued for the whole rent. **C.** ROMESH CHANDRA BISWAS *v.* GHULAM NABI FAKIR, 19 C. W. N. 867 **807**

Res judicata. *See* CIVIL PROCEDURE CODE, 1908, s. 11.

——— ——— Estoppel—Test—Burden of proof—Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required—Evidence Act (I of 1872), s. 90, presumption in, whether applicable to copies **386**

——— ——— Hindu widow, suit by, for maintenance—Subsequent suit by her for residence in family house, whether barred **25**

——— ——— ——— *Suit for ejectment of tenant—Previous suit for arrears of rent—Relationship of landlord and tenant not found to exist.*

A *mahant* of a temple brought a suit for ejectment, on the ground that he was a *muafidar* of the land in question and the defendant his tenant paying him a cash rent. Defendant alleged that he was the *pujari* and held the land as such and had never paid rent. In a previous suit between the parties for arrears of rent, the Collector had decided that the relationship of landlord and tenant did not exist between the parties, as an agreement under which the defendant was alleged to have agreed to pay rent was not proved:

Held, that the former decision operated as *res judicata*. **U. P. B. R.** RAMANUJ DAS *v.* JANKI DAS **415**

——— ——— ——— Suit for mesne profits of land—Subsequent suit for possession of the same land, if maintainable **939**

Restitution *See* CIVIL PROCEDURE CODE, 1882, s. 583; CIVIL PROCEDURE CODE, 1908, s. 144.

Resumption. *See* AGRA TENANCY ACT, ss. 50, 154, 154 (*b*).

Re-trial—Enhancement of sentence, whether a fit ground for ordering re-trial **65**

Reversioner. *See* HINDU LAW.

——— ———, suit by **6**

Review. *See* CIVIL PROCEDURE CODE, 1908, O. XLVII, R. 1.

——— *Final judgment—Application for reception of new evidence—Sufficient reason not shown—Rejection of application, propriety of—Civil Procedure Code (Act V of 1908), s. 114, O. XLVII, r. 1.*

Where an application for the reception of new evidence was made to a High Court in a case which had lasted for over three years after a final judgment had been made in the case by that Court and no sufficient reason was shown why the proposed new evidence was not timeously submitted, and the High Court rejected that application:

Held, that the rejection of the application by the High Court was correct. **P. C.** SHIVALINGAPPA BASAPPA SHINTRE *v.* REVAPPA, 17 C. W. N. 762 **717**

Revision. *See* AGRA TENANCY ACT, S. 185; CIVIL PROCEDURE CODE, 1908, S. 115; U. P. LAND REVENUE ACT, S. 185.

——— ———Accidental slip—Error, correction of—Jurisdiction **50**

———, *if allowed where appeal lies—Revision application treated as appeal.*

Where an appeal lies a revision application will not be entertained, but it may be treated as an appeal. **U. P. B. R.** SUNDAR SINGH *v.* SITAL PRASAD **678**

——— ——— Letters Patent (Madras), cl. 15—Criminal trial—Appeal, if competent **96**

——— ———, grounds for—Finding based on no evidence **61**

———Service of summons—Defendant not found—Summons served by being affixed on defendant's door, whether sufficient service **564**

Right of way, *suit for establishment of—Limitation Act (IX of 1908), s. 23, applicability of—Watercourse and way distinguished, obstruction to—Continuing nuisance.*

The obstructions which interfere with the flow of water are in the nature of continuing nuisances, as to which the cause of action is renewed *de die in diem* so long as the obstructions causing such interference are allowed to continue.

There is no distinction between an obstruction to a water-course and one to a way, and wrongful interference with a right of way constitutes a nuisance.

Obstructions to easements other than water-courses may be treated as continuing nuisances. **C.** NAZIMULLA *v.* WAZIDULLA, 21 C. L. J. 640 **385**

Risk note, Form A. *See* RAILWAY.

Rules of Supreme Court, O. XLV, rr. 5, 6, scope of—Inherent power of Court **580**

Sale. *See* CUSTOM.

— *Consideration*—Kobala *containing recital of payment of consideration*—Benami, *onus of proving—Defendant in possession—Presumption, whether arises—Admission of first evidence.*

In a suit for possession on the basis of a sale-deed

Sale—contd.

the plaintiff (vendee) has to prove his title where the defendant (vendor) in possession pleads that he is only a *benamidar* but he shows a *prima facie* title by producing and proving his conveyance which contains a recital of receipt of the consideration.

In such a case the onus is upon the defendant (vendor) to show the non-payment of consideration.

Where after the close of evidence on both sides, the plaintiff applied to the Court to be allowed to adduce further evidence but the application having been disallowed, he applied to withdraw from the suit with liberty to bring a fresh suit but the order granting this latter application was set aside on revision, and the plaintiff then applied for summons on certain persons to prove a certain part of his case, but the defendants objecting, the Court did not allow these persons to be produced, though present:

Held, that under the circumstances the plaintiff ought to have been allowed to tender further evidence. **C.** DURGA CHARAN CHANDRA *v.* KHORDA COMPANY, LIMITED **696**

———Execution against wrong representative—Property in hands of usufructuary mortgagee—Reversioner, suit by—Decree-holder purchaser, whether protected **6**

——— Irregularity—Question relating to title or some interest in land—Civil Procedure Code, 1908, O. XXI, r. 90 **308**

——— *Mortgagee selling mortgaged land—Covenant to transfer another land if vendee dispossessed by edemption—Statutory prohibition of transfer of land—Vendee, right of—Damages—Punjab Alienation of Land Act (XIII of 1900), s. 3—Contract Act (IX of 1872), ss. 2, cl. (g), 65*

The defendant sold certain mortgaged lands to the plaintiff under the impression that the mortgagor would not redeem it, and covenanted that in the event of the plaintiff losing the plot by redemption at the instance of the mortgagor, he would transfer to the plaintiff an equal area out of his own proprietary holdings. The mortgagor sued for redemption and recovered possession of the land from the plaintiff. The plaintiff sued the defendant for possession of an equal area and in the alternative for damages:

Held, that the covenant to transfer other land in lieu of the mortgaged property did not amount to an alienation *in præsenti*, but constituted an agreement to transfer in future the property specified therein on the happening of a certain contingency.

Held, further, that as the plaintiff was precluded by the Punjab Alienation of Land Act since coming into force from obtaining the land in suit in pursuance of the contract, the agreement became void, but that they were entitled to compensation. **P.** FAKIRA MAL *v.* NABBU, 83 P. W. R. 1915; 166 P. L. R. 1915 **751**

———, *oral Receipt of earnest money—Out-and-out sale—Incorrect entry of mortgage amount on that property, effect of—Failure of prompt execution and registration of sale-deed, effect of—Purchaser of property under registered deed with notice of prior oral sale, right of—Mortgage—Equity of redemption, sale of—Purchaser, right of, to redeem.*

Where a receipt of earnest money for the sale of equity of redemption of a house distinctly mentions an

Sale—concld.

out-and-out sale as having been effected, the mere fact that it goes on to say that a sale-deed will be drawn up does not show that the sale contract is incomplete, nor is an incorrect entry of the amount of a mortgage on that property an indication of the incompleteness of the sale.

The fact that such a receipt is not promptly followed by the execution and registration of a formal sale-deed is not sufficient to warrant a finding that the intention of the parties was that title should not pass until the consideration money had been paid in full.

A subsequent purchaser of the equity of redemption of a mortgage under a registered deed, having notice of a prior oral sale of the same property, acquires no title and has no right to redeem the mortgage. **P.** HARDIT SINGH *v.* BEHARI LAL, 104 P. W. R. 1915 **305**

Sale-deed, rectification of **588**

Sanction. *See* CRIMINAL PROCEDURE CODE, s. 195.

Search. *See* PENAL CODE, s. 323.

Security bond executed in favour of Court—No transfer of interest—Document, whether creates charge or mortgage—Limitation Act (IX of 1908), s. 31 (2) **605**

Second Appeal. *See* APPEAL.

Service of summons—*Defendant not found—Summons served by being affixed on defendant's door, whether sufficient service—Revision.*

In a suit for ejectment, the process-server, not meeting with the defendant, affixed the summons on his door:

Held, that this was not a good service, that it was the duty of the process-server to make reasonable endeavours and reasonable search for the defendant and that if the defendant was merely temporarily absent from his house it should not have been noted that he could not be found (*vide* rule 12, Board's Circular 2-II).

Held, further, that under the circumstances of this case to hold the service on the defendant to be a sufficient service was gross and palpable error of law which caused substantial injustice and that this was a ground for interference in revision. **U. P. B. R.** LONHAR TIWARI *v.* JAGTOO TIWARI **564**

Settlement Records *and* jamabandis—*Presumption of correctness—Gift of produce for charitable purposes—Impropriety of inventing technical names*—Malguzar.

In the absence of satisfactory evidence to the contrary entries in the Settlement Records and the annual *jamabandis* must be accepted as correct.

Where, therefore, the ancestors of the plaintiffs who were originally the absolute owners of the land in dispute made a gift of half the produce of the land to the ancestors of the defendants with the object of charitably supplying them with means of livelihood:

Held, that the plaintiffs having been in physical possession for a very long time and there being no intention of transferring ownership or possession to the defendants, the latter had no right to possession of the land.

Settlement Records—concld.

Where the rights and liabilities of the parties are perfectly well defined and both the parties have acted in accordance therewith for a long time, it is unnecessary for the Court to invent a legal expression by which the relationship existing between the parties should be described. **P.** MILKHI MAL *v.* GULAB SINGH, 79 P. W. R. 1915; 154 P. L. R. 1915 **893**

Sir Land. *See* MORTGAGE.

———*Co-sharers—Share of one co-sharer sold—No separation—Exproprietary right*—Sir, *character of.*

S sold his share of 7 pies out of a 5 annas and 9 pies share in the *mahal* to the plaintiff long ago, but *S* neither claimed exproprietary rights in the *sir* to the extent of his 7 pies share out of the *sir* of the 5 annas 9 pies co-sharers, nor was this portion of land separated from the rest. The plaintiff brought the present suit for the ejectment of the tenant who claimed occupancy rights. The Courts below held that in consequence of this sale, the land lost its character of *sir* to the extent of 7 pies share and that the respondent who was the tenant of the *sir* land held partly as occupancy tenant and partly as sub-tenant and could not be ejected:

Held, that had the portion of the land, corresponding to *S*'s share, been divided off, it would have ceased to be *sir*, but this not having been done, it still retained its character as *sir*. **U. P. B. R.** KAMAL-UD-DIN *v.* RAMZAN ALI **64**

Siyeeba. *See* MUHAMMADAN LAW.

Specific performance—*One contract alleged and different contract proved—Damages.*

Where a plaintiff has alleged a contract of which he seeks specific performance but fails to establish it, the Court will not make a decree for specific performance of a different contract.

Where there is a contract of which specific performance would not be decreed by the Court of Equity the plaintiff is entitled, owing to the wrongful repudiation of that contract by the defendant, to treat the contract itself as at an end and to recover damages for the loss of it, in addition to damages in respect of those breaches of it which may have been committed before repudiation.

To make a decree for damages for the breach of a contract which is not the subject-matter of the litigation, would be to assume that there has been a breach of that contract which has never been attempted to be specifically enforced.

The principle upon which the Court refuses specific performance of a contract not the subject-matter of the suit, is equally applicable to the claim for damages for breach of that contract. **C.** NILKANTA ROY *v.* LALIT MOHAN BANERJEE, 19 C. W. N. 933 **969**

Specific Relief Act (I of 1877), s. 9—*Suit for possession based on possessory title—Defence—Defendant's right to set up title.*

A suit in ejectment on the basis of possessory title is maintainable against any person who cannot show title in himself, apart altogether from the provisions of section 9 of the Specific Relief Act. The difference is that in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas

Specific Relief Act—concld.

in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under section 9 of that Act has expired, the defendant will be allowed to plead his title and to prove it, if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. **A.** MAKHDOOM BAKHSH SHAH *v.* HASHIM ALI **210**

——— **ss. 15, 16**—*Contract to sell whole house—Vendor possessing only half share—Specific performance.*

The defendant No. 1 on behalf of himself and as agent of the defendant No. 2 agreed to sell a house, in which each of the two defendants had one-half share, to the plaintiff. Defendant No. 1 had no authority to sell the half share of defendant No. 2. The plaintiff sued for specific performance of the contract:

Held, that the plaintiff was only entitled to a decree for specific performance for half the house on condition of paying the full price agreed upon for the entire house. **A.** MAHMUD ALI *v.* YAWAR BEG, 13 A. L. J. 739 **628**

——— **s. 16** **628**

——— **s. 26 (e)** **449**

——— **s. 31** **588**

——— **ss. 38, 41** **804**

——— **s. 41** — *Discretion — Minor's mortgage, cancellation of, suit for—Decree—Consideration paid, if to be allowed.*

The discretion conferred upon the Court by section 41 of the Specific Relief Act must be so interpreted and exercised as only to impose upon a plaintiff seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the parties were reversed and he were the defendant in a suit brought to enforce the instrument according to its terms.

Where the plaintiff brought a suit for setting aside a mortgage-deed executed by him while he was a minor and his mother, who was his certificated guardian, and a decree was passed conditional on his paying the full consideration of the deed in suit:

Held, that as a minor's contract was void the plaintiff's suit should have been decreed as brought. **A.** GAYA PRASAD *v.* SARFARAZ CHAUDHRI **972**

——— **s. 42** **53**

——— **s. 42**—*Fraudulent decree, suit to set aside, when maintainable—Consequential relief, necessity of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when not permitted.*

A suit to declare that a decree is fraudulent and void will not lie unless followed up by a prayer for consequential relief, such as an injunction restraining the decree-holder from executing the decree.

A Court should not exercise its wide powers of amendment under Order VI, rule 17, of the Civil Procedure Code when the plaintiff has not availed himself of the other remedies open to him. **M.** RAMANADHAN CHETTIAR *v.* ANNAMALAI CHETTY **132**

Stamp Act (II of 1899), s. 14 **602**

——— **ss. 33, 35**—*Instrument insufficiently stamped, examination of, optional—Stamped instrument admitted in evidence does not apply to criminal proceedings—Penal Code (Act XLV of 1860), s. 405—Breach of trust—Conversion, evidence of.*

Under section 33 of the Stamp Act it is optional to the Magistrate to examine or impound the instrument if it appears to be insufficiently stamped.

But the prohibition contained in the first part of section 35 that no instrument chargeable with duty shall be admitted in evidence for any purpose or acted upon unless it be duly stamped, does not apply to proceedings in a Criminal Court.

Where it is proved that the two accused or either of them were in fact entrusted with certain property as servants, and they set up a claim that it belongs to them, and refuse to return it, that in itself is evidence of conversion to justify a conviction under section 405, Indian Penal Code. **C** JAGANNATH RAHATGIR *v.* DEOKINANDAN, 16 CR. L. J. 543 **671**

——— **s. 35** **671**

——— **Sch. I, Art. 1**—*Account book entries, if required to be stamped—Admissible in evidence.*

The account book entries are not liable to stamp duty and are admissible in evidence for what they are worth. **L. B.** RAMDAVAL *v.* KUMAR GANGADHAR BOGLA **943**

Statute, construction of **325**

Stridhanam. *See* HINDU LAW.

Subrogation. *See* MORTGAGE.

——— , right of. *See* TRANSFER OF PROPERTY ACT, s. 53.

Succession. *See* AGRA TENANCY ACT, s. 22; CUSTOM.

Succession Act (X of 1865), s. 50—*Will—Valid execution, what is.*

Where the respondent applied for Probate of a Will and it appeared that the Will was wholly in the handwriting of the deceased and bore his signatures on the various pages thereof, and alongside his signature on the top left-hand corner of the 1st page were the signatures of four witnesses and on each of the other three pages the signatures of two out of those four persons:

Held, (1) that the signature of the testator on the first page was the operative signature by which he intended to make the document an effective one;

(2) that the witnesses put their signatures *animo attestandi* and the Will was properly executed by the deceased in the manner required by the Indian Succession Act. **C** SABITRI THAKURAIN *v.* F. A. SAIN, 19 C. W. N. 1297 **743**

Suit *on a lost bond—Admission of execution—Plea of payment—Burden of proof.*

Where a suit was brought on a lost bond and the defendant admitted its execution but pleaded payment:

Held, that the question of loss of the document was not material and that it was for the defendant to prove payment. **A.** JHANDU MAL *v.* KARAN SINGH, 13 A. L. J. 567; 37 A. 426 **606**

Suit—concld.

—— to recover possession of trust properties—Management of temple transferred under agreement—Agreement found to be void—Suit to recover possession—Suit to set aside agreement, whether to be brought within three years **1**

Suits Valuation Act (VII of 1887), s. 11, *rules under—Jurisdiction of Court—Waiver—Consent—Valuation of suit.*

The valuation of a suit, for a declaration that the plaintiff is the owner of a certain land assessed with land revenue for purposes of jurisdiction is governed by rules framed under the Suits Valuation Act, and the plaintiff cannot fix an arbitrary valuation and make the suit cognizable by a Court of a particular grade.

Neither waiver nor consent of parties can confer upon a Court jurisdiction to entertain a suit which is beyond its pecuniary limits. The fact that the defendant did not object to the jurisdiction of the Court does not validate the proceedings. **P.** GHULAM AKBAR KHAN *v. Musammat* BAKHAT BIBI, 116 P. L. R. 1915 **796**

Summons, service of, when complete **109**

Surety. *See* CRIMINAL PROCEDURE CODE, s. 122.

——, when liable **149**

——, qualifications of **825**

Survey records, admissibility in evidence of **154**

Tenant *goes away on pilgrimage—Cousin cultivates and manages holding—Tenant does not return—Presumption of death—Co-sharing explained—Co-sharing possible, though tenant absent.*

An occupancy tenant went away on a pilgrimage after arranging with his cousin for the cultivation of his holding and the payment of rent. During the absence of the tenant the cousin collected rent for the portion held in sub-tenancy and cultivated the remainder of the holding himself:

Held, that these facts amounted to a sharing with the tenant (though he was not present in the village), whose death must be presumed after a lapse of seven years from his leaving the village.

Sharing does not necessarily imply cultivation by two or more persons. **U. P. B. R.** DORI SINGH *v.* LOCHAN **427**

——*Mortgagee—Rent-paying grove mortgaged—Suit for arrears of rent against mortgagor—Mortgagee not made party—Ejectment of mortgagee.*

A rent-paying grove-holder mortgaged his grove with possession. After the mortgage the *zemindar*, without impleading the mortgagee as a defendant, sued the mortgagor for arrears of rent, obtained a decree and ejected him for its non-payment. Then he sued to eject the mortgagee as a tenant from year to year, the mortgagor's rights having been extinguished:

Held, that the mortgage being with possession, the mortgagee was a necessary party to the suit for arrears of rent and that the landlord could not eject him so long as he did not pay up the mortgage-money or so long as the land retained the character of a grove. **U. P. B. R.** RISAL RAI *v.* NEPAL RAI **676**

Theft, charge of—Identification doubtful—Verdict of Jury, when can be set aside **72**

Title. *See* DECLARATION OF TITLE.

——Current coin, title to—Proceeds of cheating paid in satisfaction of debt—Right of creditors to retain money **92**

——, *declaration of—Possession, recovery of—Mortgage, if can be questioned against a* bona fide *purchaser for value without notice—Estoppel—Limitation Act (IX of* 1908), *Sch. I, Art.* 137, *scope of.*

Those who have derived title subsequent to a mortgage cannot be permitted to impeach the genuineness of that transaction to the detriment of a *bona fide* purchaser, for value without notice from a purchaser in a Court sale.

A *bona fide* transferee for value from an ostensible owner is allowed to protect himself against a claim by the real owner. **C.** RAM SUMNUN PROSAD *v.* GENDA LAL RAI **841**

—— Exchange of *patta* and *muchilika*, whether confers title **12**

——, proof of **154**

Trade-mark, *infringement of—Advertisement—Publication of advertisements—Cause of action—Jurisdiction.*

A trade-mark can be infringed by means of advertisement. The cause of action for such infringement arises partly where the advertisement is published and distributed. **A.** KHESHTRAPAL SHARMA *v.* PANCHAN SINGH VARMA **987**

Transfer of case. *See* CRIMINAL PROCEDURE CODE, s. 526.

Transfer of a civil case—*Judge's expression of opinion about plaintiff's paper, when not ground for transfer—Conduct of plaintiff.*

An expression of opinion by a Judge as to the character of the plaintiff or of his paper, is no ground for transfer when that expression of opinion was elicited by the conduct of the plaintiff himself. **M.** TANGUTURU SRIRAMULU, *In re* **29**

Transfer of Property Act (IV of 1882), s. 6 (a)—*Contract Act (IX of* 1872), *s.* 23—*Agreement to sell by reversioner of an estate when it devolves upon him—Specific performance, if enforceable—Contract, validity of.*

A contract by an expectant reversionary heir to an estate to sell the same if and when it devolves upon him, is not specifically enforceable. The contract is prohibited by section 6 of the Transfer of Property Act and is also void under section 23 of the Contract Act. **M.** KAKARALAAPUDI LAKSHMI NARAYANA *v* KANDUKURI VEERA SARABHA, 17 M. L. T. 419; 28 M. L. J. 650 **241**

—— —— —— **s. 6 (a)**—Transfer of *spes successionis*—Restraint upon alienation **549**

—— —— —— **ss. 6 (a), 43**—Transferor representing himself to be an absolute owner when he is not—Subsequent acquisition of title by inheritance—Transfer, validity of **439**

—— —— —— **ss. 10, 12**—*Property given to widow for maintenance with no right to transfer—Condition, whether valid—Life-estate, whether property—Maintenance, right of, transfer of.*

A life-interest is just as much property as an absolute interest and any condition absolutely restraining the transferee from disposing of that property is void.

Transfer of Property Act—contd.

Where the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance but that she should not be able to alienate it:

Held, that the restriction on the defendant No. 2's right to alienate the property was contrary to sections 10 and 12 of the Transfer of Property Act and, therefore, void.

A right to maintenance cannot be transferred under section 6 (*d*), Transfer of Property Act, 1882, but specified property given in lieu of maintenance can be transferred. **C.** RAM CHANDRA *v.* GOPI NATH **251**

——— ——— ——— **s. 12** **251**

——— ——— ——— **ss. 14, 54**—*Contract for sale of immoveable property, whether creates vested interest—Rule against perpetuities—Contract, whether enforceable against survivors of joint Hindu family.*

Under section 54 of the Transfer of Property Act a contract for the sale of immoveable property does not by itself create any interest in the property. It does not run with the land and is not binding upon a purchaser without notice.

Nor does such a contract fall within the scope of section 14 of the Transfer of Property Act, but it is enforceable against the surviving members of a joint undivided Hindu family. **M.** RAJA OF KARVETNAGAR *v.* VELAYUDA REDDI, 18 M. L. T. 83 **435**

——— ——— ——— **s. 43** **439**

——— ——— ——— **s. 53**—*Assignments in fraud of creditors—Part payment of consideration for a previous mortgage—Right of subrogation, whether exists.*

The fact that an assignment is set aside as being one in fraud of creditors under section 53, Transfer of Property Act, does not prevent the Court from declaring a charge upon the property assigned to the extent of the payment made by the assignee towards the redemption of a previous mortgage.

In the absence of any conflicting equities the mere fact that the consideration for the previous mortgage has not been paid in full does not prevent the assignee from claiming the right. **M.** UMMACHAKUTTI *v.* UMMERKUTTI HAJI **583**

——— ——— ——— **s. 53**—*Mortgage executed in order to defeat creditors if void—Consideration paid in part—Suit to enforce mortgage security—Lien.*

Section 53 of the Transfer of Property Act does not render a transaction void, but it is only voidable at the option of any person defrauded, defeated or delayed thereby.

In order to bring a case within the scope of section 53 fraudulent intention alone is not enough, there must also be evidence to show that there were other creditors at the time of the transaction who were intended to be defrauded or defeated.

A mortgage can be enforced for so much of the consideration as is proved to have been paid by the mortgagee to the mortgagor.

Where the defendant No. 1 executed a mortgage of two properties, a parcel of land and a hut on another parcel, in favour of the plaintiff and the defendant No. 2, a creditor of the defendant No. 1, obtained a money-

Transfer of Property Act—contd.

decree against him and in execution thereof purchased the hut; in a suit to enforce the mortgage security:

Held, (1) that defendant No. 2 as purchaser of the equity of redemption in the hut alone was in no way interested in the first parcel of land which belonged to the mortgagor and could not, therefore, object to the sale of that parcel by the mortgagee,

(2) that it being plain from the orders in the execution proceedings, wherein defendant No. 2 became the purchaser, that he acquired the hut subject to the lien of the plaintiff, he could get relief only on condition that he satisfied that lien. **C.** KRISHNA KUMAR NANDY *v.* JOY KRISHNA NANDY **690**

——— ——— ——— **s. 53**—*Right of simple mortgagee to bring suit under s. 53 of Transfer of Property Act to declare an alienation void—Creditor—Decree for sale of mortgaged property—Personal remedy if barred—Limitation Act (IX of 1908), Sch. I, Arts. 120, 91, 95—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14.*

A simple mortgagee who has obtained a decree for sale and whose right to a personal decree is not barred, is a "creditor" within the meaning of section 53 of the Transfer of Property Act and can bring a suit to set aside an alienation made in fraud of creditors.

To such a suit Article 120 and not Article 91 or 95 of Schedule I of the Limitation Act, 1908, applies. **M.** AUTHIKESAVALOO NAICKER *v.* SHAH ABDULLA, 2 L. W. 479; (1915) M. W. N. 337 **62**

——— ——— ——— **s. 53**—*Subsequent transferee, definition of—Interest in property, existence of—Fraudulent transfer—Auction-purchaser, whether subsequent transferee.*

A person, who steps in by operation of law and not by any act of the owner, is not a subsequent transferee within the meaning of section 53 of the Transfer of Property Act. He is not a person having an interest in the property within the meaning of the section which refers to interest which exists at the time of the transfer objected to.

Where, therefore, *P* sold his interest in a certain land to plaintiff in 1906 and in execution of a money-decree passed against *P*, his rights in the property were sold at a Court sale on 22nd January 1909 to the defendant, and on the defendant being placed in possession of the property, the plaintiff sued to recover possession under the sale-deed of 1906:

Held, that the sale-deed was not voidable at the option of the defendant inasmuch as he was not a transferee nor a person having interest in the property within the meaning of section 53 of the Transfer of Property Act. **B.** VASUDEV RAGHUNATH OKA *v.* JANARDAN SADASHIV APTE, 17 BOM. L. R. 522; 39 B. 507 **497**

——— ——— ——— ——— **s. 54** **435, 886**

——— ——— ——— **s. 54**—*Sale by registered instrument or by delivery of possession—Bond, where to be registered—Intention to sell or mortgage, want of—Registration law, fraud on.*

Per *Sharfuddin, J.*—Under section 54 of the Transfer of Property Act the sale of immoveable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property.

Transfer of Property Act—contd.

A Registrar has no jurisdiction to register a bond where the person giving the bond has no property in the district **C.** UDIT NARAIN *v.* MATHURA PRASAD **413**

——— ——— **s. 55 (1) (a)** **394**

——— ——— **s. 55 (2)**—*Knowledge of vendor's defective title, whether bar to recovery of purchase-money.*

A vendee is entitled to rely on section 55 (2) of the Transfer of Property Act. His knowledge that the vendor's title was defective will not preclude him from suing for recovery of his purchase-money if he is deprived of the property sold. **M.** VELLAYAPPA ROWTHEN *v.* BAVA ROWTHEN **747**

——— ——— ——— **s. 55, sub-sec. (4), cl (b)**—*Charge, meaning of Debt and security, if can be transferred.*

The charge mentioned in section 55, sub-section (4) clause (*b*) of the Transfer of Property Act, is not a personal right of the seller himself, and, therefore, can be transferred to an assignee. The debt itself can be transferred and also the security for it. **C.** SHEO NANDAN LAL *v.* JAINUL ABDIN, 19 C. W. N. 899 **869**

——— ——— ——— **s. 55 (6) (b)** **886**

——— ——— ——— **ss. 58, 100**—*Security bond executed in favour of Court—No transfer of interest—Document, whether creates charge or mortgage—Limitation Act (IX of* 1908), *s.* 31 (2).

Where a security bond, after reciting an order of the Court made upon an application that the possession of certain immoveable property should not be delivered over to the plaintiff, stated that "we have, for a sum not exceeding Rs. 300, made the properties mentioned below security":

Held, (1) that the document did not transfer an interest in the property nor was there any existing or future debt or an engagement which might give rise to a pecuniary liability within the meaning of section 58 of the Transfer of Property Act;

(2) that it merely created a charge and did not fall within section 31 of the Limitation Act. **M.** RAMACHARIAR *v.* DORASAMI PILLAI **605**

——— ——— ——— **s. 59** **886**

——— ——— ——— **s. 59**—*Mortgage-deed not attested by two witnesses—Invalidity of mortgage—Pleas raised in course of trial but not in pleadings—Court, duty of—Procedure.*

Where in the course of the trial and not in the pleadings a defendant raises the plea that the mortgage is invalid because the signature of the mortgagor was not attested by two witnesses as required by section 59 of the Transfer of Property Act, the Court should not dismiss the suit for that reason. It is only upon a distinct and supplemental issue framed on the point and after giving both the parties an opportunity to adduce fresh evidence on it, that a Court should find for or against the invalidity of the document for that reason. **M.** RATNA NAIDU *v.* AIYANACHARIAR **991**

s 76 c) — *Mortgagor bound to pay Government revenue Revenue falling into arrears—Sale of property, whether liable, to be set aside.*

Transfer of Property Act—contd.

Section 76 (*c*) of the Transfer of Property Act does not apply where the deed of mortgage distinctly provides that the Government revenue shall be paid by the mortgagor.

Where, therefore, it was an express condition of a deed of mortgage that the Government revenue need not be paid by the mortgagee and the property was put up to sale on account of the revenue falling into arrears, on a suit for redemption brought by the assignee of the mortgagor:

Held, that as the mortgagee was not bound by law to pay the revenue, the purchaser was not guilty of any fraud and the sale could not be set aside **M.** OOPPATH NARAMPARAMBATH KUTTAN *v.* KOYAKUTTY **344**

——— ——— ——— **s. 82** — *Contribution — Properties of two owners mortgaged to secure one debt—One owner and his property, release of, on payment of one-half of debt—Major portion of property released—Liability of other mortgagor and remaining portion of mortgaged property.*

Where properties of unequal value belonging to two owners were mortgaged to secure a single debt and the mortgagee, on receiving one-half of the mortgage amount from one of the mortgagors released his portion of the mortgaged properties, which were of higher value, and sought to realise the balance of the mortgage amount from the remaining properties belonging to the other mortgagor:

Held, that he was entitled to do so and that the suit properties were liable to be sold for the whole of the balance remaining due upon the mortgage and not only to contribute rateably towards the mortgage-debt.

Per *Napier, J.*—A Court should not introduce such provisions as the Legislature has not thought fit to incorporate in Transfer of Property Act. **M.** THUVOOR VENKATASUBBA REDDY *v.* BAGIAMMAL, 2 L. W. 469; (1915) M. W. N. 339; 17 M. L T. 411; 29 M. L. J. 319 **113**

——— ——— ——— **ss. 82, 101**—*Usufructuary and simple mortgage in favour of same person—Mortgagee purchasing some of mortgaged property—Suit on simple mortgage—Liability of property purchased to rateable contribution.*

The defendant No. 1 and another mortgaged certain properties to the plaintiff with possession. Later on defendants Nos. 1 and 2 executed a simple mortgage in respect of the same lands as well as a house and a house site in favour of the plaintiff. The plaintiff then purchased the lands, the sale-deed expressly stating that the debt secured by the simple mortgage should stand. In a suit to enforce the mortgage security under the second mortgage:

Held, (1) that the plaintiff took the lands subject to all the incidental liabilities which attached to them by reason of their having been previously mortgaged under the simple mortgage and which were, therefore, liable to contribute to the debt secured by it;

(2) that the plaintiff's liability to contribute out of the value of the lands purchased by him arose not by reason of his position of usufructuary mortgagee but by his purchase of the mortgagors' equity of redemption.

Transfer of Property Act—concld.

Held, (per *Napier, J.*, dissenting), that the plaintiff mortgagee was entitled to enforce his claim for the whole amount of his mortgage against the property. M. ARUNAGIRI MUDALIAR *v.* KUPPUSAMI PILLAI **124**

——— **s. 83** **929**

——— **s. 83** -- *Conditional deposit of mortgage money in Court—Condition requiring return of documents to which mortgagor not entitled, effect of — Tender conditional, whether valid.*

A condition requiring a return of certain documents to which the mortgagor is not entitled attached to a deposit by the mortgagor under section 83 of the Transfer of Property Act vitiates the tender. **M.** *In re* ACHATH SANKARAN **586**

——— **ss. 83, 84**—*Deposit of mortgage amount, when valid—Interest, when ceases to run.*

It is only the actual payment of the full mortgage amount into Court that makes interest on the mortgage amount cease to run under section 84 of the Transfer of Property Act, and not a mere presentation of a petition for that purpose under section 83 of the Act. **M.** MUSALIUM VEETIL THEYATHIL MAHAMMADUNNI *v.* KUDUMPALATH PADINHARA PARAMBIL BAVA, 2 L. W. 408 **145**

——— **s. 84** **145**

——— **s. 85** **752**

——— **ss. 88, 89** **237**

——— **s. 101** **124, 916**

——— **s. 106** **605**

——— **s. 107** **797**

Trespass—Ejectment, suit in—Tenant-in-common, right of one to sue alone **60**

Trust—Expenditure incurred by *de facto* trustee during management, whether ground for retaining possession until payment of expenses **1**

——— property, following of—Tracing and *quasi*-charge, doctrine of, if applicable **37**

Trusts Act (II of 1882), ss. 20, 23—*Agreement by lessee to deposit one year's rent with lessor—Lessor, whether trustee—Deposit of money by lessor in Bank at lessee's request—Failure of Bank—Lessor, whether liable for loss.*

Where a lessee deposited an amount eqnivalent to one year's rent with his lessor till the expiry of the lease or its cancellation and at his request the lessor deposited the money in a certain Bank and paid its interest to the lessee, but the Bank failed and the lessor's assignee sued the lessee for rent:

Held, that even if the lessor be assumed to be in the position of a trustee, he was not liable for the loss of the money and his assignee was entitled to sue for the rent. **M.** RAJARAM ROW *v.* VENKATACHELA CHETTIAR **997**

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U. P. General Clauses Act (I of 1904), s. 4 (23) **16**

U. P. Land Revenue Act (III of 1901), ss 106, 110, 111, 112, *applicability of—Imperfect partition—Proprietary title—Civil Court, jurisdiction of.*

Sections 110, 111, 112 of the Land Revenue Act do apply to imperfect partitions and, therefore, the rule to the effect that a party to a partition proceeding who has had the opportunity of pleading a question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does apply to proceedings taken for imperfect partition. **A.** RAGUBIR *v.* TULSHI RAM, 13 A. L. J. 548 **222**

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——— **s. 172**--*Mango trees—Standing timber—Sale whether can be set aside by deposit—U. P. General Clauses Act (I of 1904), s. 4 (23)—Immoveable property—Standing timber.*

The mango trees when sold with the intention that they should be cut down and taken away by the purchaser are standing timber. Under section 4, clause 23 of the United Provinces General Clauses Act immoveable property does not include standing timber and, therefore, a sale of them cannot be set aside by deposit of money under section 172 of the Land Revenue Act. **U. P B. R.** JATA SHANKAR *v.* RAM DAT **16**

——— **s. 185**—*Revision, power of—Suit for profits—Claim admitted—Plaintiff absent—Suit dismissed—Order, legality of.*

Where in a suit for profits the plaintiff was absent on the date of hearing and the defendant who was present, admitted part of the claim but the Court dismissed the suit *in toto*:

Held, that the order was glaringly illegal and that the Board had jurisdiction under section 185 of the Land Revenue Act to set aside the order. **U. P. B. R.** RAFIULLAH *v.* AHMAD SALEH **33**

U. P. (Local) Government Rules unders. 70, Civil Procedure Code, rr. 30, 31, 32 **89**

Upper Burma Land and Revenue Regulation, s. 53 (2) (ii), *whether* ultra vires—*Suit regarding State lands between private individuals—Jurisdiction of Civil Courts.*

Section 53 (2) (*ii*) of the Upper Burma Land and Revenue Regulation is *ultra vires* of the Legislature, even in respect of suits regarding State lands between private individuals.

Consequently a suit for a decree declaring that a house situate on Government land is not liable to be sold in execution is cognizable by a Civil Court. **U. B.** MAHOMED AMIN *v.* NACHIAPPA CHETTY, 8 BUR. L. T. 45 **736**

Vendor and purchaser—*Court auction-purchaser—Mortgage, existence of, undisclosed—Liability to pay, if non-existent—Purchaser from such purchaser compelled to pay mortgage amount—Liability of auction-purchaser to indemnify private purchaser.*

Where a person purchases certain immoveable property at a Court sale in execution of a money decree, in ignorance of the existence of a mortgage

Vendor and purchaser—concld.

upon the same, and subsequently sells it privately to a third party who also purchases without the knowledge of the existence of the mortgage, and where the mortgage is afterwards disclosed and the private purchaser is compelled to pay the amount thereof, the latter is not entitled to claim compensation from his vendor, as the purchaser of property in a Court sale takes it not only with all benefits but also subject to all liabilities. **M.** MUTHUSWAMY PILLAY *v.* MUTHUVEERAM PILLAY, 2 L. W. 517 **392**

———————*Obligation to secure quiet and peaceful enjoyment—Signing of sale-deed, if sufficient—Contract of sale and delivery of possession—Defence against ejectment—Specific performance—Claim for mesne profits, essence of.*

Per *Spencer, J.*—It is the duty of every seller of immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey.

A contract of sale followed by delivery of possession cannot be pleaded in defence to an action for ejectment where there is no registered sale-deed, but the defendant can avoid the difficulty by suing for specific performance and getting the action in ejectment postponed pending the result of the suit.

Per *Coutts-Trotter, J.*—A vendor is under no obligation to register the document he had given.

The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. **M.** MANIYAM KUPPANNA *v.* KUPPANA GOUNDEN, (1915) M. W. N. 319 **195**

———————*Sale of land—Deficiency in extent—Transfer of Property Act (IV of 1882), s. 55 (a)—Covenant for title, meaning of—Compensation for breach of contract—Claim made after execution of conveyance.*

A covenant for title is only a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that the seller has power to transfer the same.

A suit to recover compensation for deficiency in the extent of land purchased is not a suit for damages for breach of a convenant for title, but one for part failure of consideration and for compensation for failure to perform the vendor's part of the contract in full.

Where under the contract the part unperformed bears only a small proportion to the whole of its value, a suit for specific performance with a claim for compensation would lie for the unperformed part.

The same rule also holds good even where the mistake as to the extent is discovered after the execution of the conveyance, as the vendee before that date has no right to inspect the land except with the vendor's permission. **M.** JANGA VENKATAREDDY *v.* JAMAL AHMED SAHEB, (1915) M. W. N. 422; 29 M. L. J. 122 **394**

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Waste land—*Title — Evidence — Possession — Quantum of evidence necessary—Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Open village sites, title of Government—Presumption.*

Section 37 of the Land Revenue Code does not confer title on Government and there is no presumption of title in favour of Government even as to open village sites.

Where there is already title in one party, the law is slow to infer that the physical acts of user were done with the intention of defeating that title or of laying claim to land already vested in another, but the same acts of user which do not suffice as evidence of actual possession might be adequate proof of possession when the title to the land is in doubt.

In such cases the quantum of evidence depends upon the character of the land and although in the case of waste lands, the Court would seize upon the slightest evidence of occupation, the occupation or the acts of user must be such as to indicate the intention to hold for oneself, for without such intention there is no possession. **S.** SULTAN MUHAMMAD *v.* SECRETARY OF STATE, 8 S. L. R. 331 **51**

Widow. *See* HINDU LAW.

Wild Birds Protection Act (X of 1887)—*Wild Birds and Animals Protection Act (VIII of 1912), s. 3—Rules framed under Act of 1887 not superseded by new rules under Act (VIII of 1912)—Old rules to be interpreted by sections of later Act—Burden of proof.*

Though the rules framed under the Wild Birds Protection Act of 1887 have not been superseded by the rules framed under Act VIII of 1912, they are to be interpreted by the sections of the later Act.

The burden of proving that the egrets whose feathers were alleged to have been imported into Monywa Municipality were captured or killed during the close season contrary to the rules lies on the prosecution and it is illegal to lay it on the accused. **U. B.** MAHOMED JAMAL *v.* EMPEROR, 8 BUR. L. T. 20; 16 CR. L. J. 550 **822**

Wild Birds and Animals Protection Act (VIII of 1912), s. 3 **822**

Will. *See* HINDU LAW.

———*Application for Letters of Administration—Institution of subsequent suit to contest validity of Will—Probate Court, if to stay proceedings*—Factum *of Will—Judgment* in rem—*Oral evidence as to execution of Will—Improbabilities.*

A Probate Court is bound to determine whether a Will was as a matter of fact made, and it cannot stay its proceedings and wait indefinitely for the decision of a suit subsequently instituted in regard to validity of the Will which decision may or may not be in favour of the caveator. The possibilit of a finding as to the

Will—contd.

invalidity of a Will, which finding can only be binding upon the parties to the suit, does not constitute a sufficient justification for a Probate Court to postpone its decision as to its due execution, more especially as the decision of the Probate Court on the point operates as a judgment *in rem*.

In order to conclude whether a Will is genuine, internal evidence is no doubt of great importance. But an improbability to prevail against direct evidence of disinterested witnesses must be clear and cogent. The incidents mentioned by a Court for raising a presumption of probability or improbability are of no value if they are either wrong on facts or capable of explanation by reference to other considerations which have been lost sight of by that Court. **P.** MAYA RAM *v.* MALAN DEVI, 66 P. W. R. 1915; 145 P. L. R. 1915 **687**

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—— *not produced—Presumption—Secondary evidence, admissibility of—Estoppel.*

The rule of law that "when a Will is traced to the possession of the deceased and is not forthcoming at his death the presumption is that he has destroyed it", must be applied with considerable caution in India in view of the habits and condition of the people.

A Hindu *Jat* in 1884 executed a Will under which his surviving sons and a grandson whose father had died were to take equal shares. In 1898 he revoked that Will and executed another by which he excluded two of his sons. After his death mutation was made in accordance with the Will of 1884. The devisees under the second Will, except two of the grandsons, sued for the shares in respect of which the two excluded sons had been recorded as owners. Before the trial of the suit the parties agreed to refer the dispute to arbitration. Thearbitrators made an award and in accordance therewith the suit was dismissed. The plaintiffs applied for revision of the order and one of the plaintiff's thereafter applied to withdraw his application for revision. The Chief Court reversed the order of dismissal and remanded the case for trial. At the trial the original Will of 1898 was not forthcoming but a copy of that Will was obtained from the Registrar's Office and admitted in evidence without any objection:

Held, that the Will was admissible in evidence as the reasonable presumption was that the Will was mislaid and lost or else stolen by one of the defendants after the death of the testator.

Held, further, that the plaintiff who had withdrawn his revision petition was not estopped from claiming his share nor were those who had not joined in the suit. **P. C.** PADMAN *v.* HANWANTA, 19 C. W. N. 929; 13 A. L. J. 801; 17 BOM. L. R. 609; 18 M. L. T. 54; 2 L. W. 645; (1915) M. W. N. 500; 22 C. L. J. 172; 110 P. W. R. 1915; 29 M. L. J. 307 **807**

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INDIAN CASES.

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VOLUME XXIX.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 236 OF 1912.

February 23, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Trotter.

C. T. N. NARAYANAN CHETTIAR AND OTHERS—DEFENDANTS NOS. 2 TO 4 AND 11 TO 13—APPELLANTS

versus

V. S. V. LAKSHMANAN CHETTIAR, DECEASED, AND OTHER—PLAINTIFFS AND DEFENDANTS NOS. 5, 6 AND 8 TO 10—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 91, 124—Suit to recover possession of trust properties—Management of temple transferred under agreement—Agreement found to be void—Suit to recover possession—Suit to set aside agreement, whether to be brought within three years—New issue framed at close of case—Fresh evidence, production of, right of—Expenditure incurred by de facto *trustee during management, whether ground for retaining possession until payment of expenses.*

The Limitation Act merely prescribes within what periods suits must be brought, and cannot be construed as of itself creating an obligation to sue where none exists. [p. 2, col. 2.]

Sales which are *ab initio* void cannot become valid if not set aside within three years by suit. [p. 3, col. 1.]

Sidhu Sahu v. *Gopi Charan Das*, 18 Ind. Cas. 969; 17 C. L. J. 233; *Malkarjun* v. *Narhari*, 25 B. 337; 2 Bom. L. R. 927; 5 C. W. N. 10; 27 I. A. 216; 10 M. L. J. 368 (P. C.); *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*, 23 M. 271; 27 I. A. 69; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29, referred to.

A suit to recover possession of a temple from the managers, in whose hands its management was vested under an agreement, is in time if brought within 12 years and more than three years from the date of the agreement, though no suit to set aside the agreement was brought under Article 91, Schedule I of the Limitation Act. [p. 3, col. 1.]

Mere permission to raise an issue at a late stage of the case does not imply that the party on whose behalf it is raised is at liberty to let in evidence on issues already closed. [p. 3, col. 2.]

In the case either of public or private charities the Court is not bound to leave the trust estate in possession of a person not entitled to the character of a trustee, merely because he expended money on it while acting as trustee. On the other hand, it is the duty of the Court, especially in the case of public charitable trust to take the trust property out of the possession of persons not entitled to hold it, while making due provision for any claims which they may have in respect of the expenditure incurred in connection therewith. [p. 4, col. 1.]

Where a plea as to improvements is raised merely as a pretext to keep back possession, effect ought not to be given to such plea. The proper course is to direct the defendants trustees to deliver possession, and then direct accounts to be taken as between the *de facto* trustee and the temple in order to ascertain the amount to be allowed to him for expenses incurred by him in the course of such management. [p. 4, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Ramnad, in Original Suit No. 58 of 1911.

FACTS.—Suit to recover possession of a temple and its endowments from the defendants. Disputes existed between the trustees of the Nattukottai Chetty temple at Aryapudi, and while the disputes were pending settlement the trustees handed over the management of the temple to one Krishna Chetty and another under an agreement. The disputes were settled and the trustees sued to recover possession of the temple. The Sub-Judge of Ramnad decreed in favour of the plaintiffs for possession and disallowed the defendants' claim for improvements effected by them while in management. The defendants appealed.

Messrs. *K. Srinivasa Aiyangar* and *A. Krishnasami Aiyar*, for the Appellants, contended

that (1) the trustees having executed a document in favour of the defendants, vesting the management of the temple in them, that document was not set aside within three years under Article 91, Schedule I, of the Limitation Act, and the present suit brought more than three years from the date of document is barred by limitation. (2) The defendants are entitled to a sum of Rs. 20,000, money spent by them in repairing the temple and constructing Vahanms, etc.

Mr. *C. V. Anantha Krishna Aiyar*, for the Respondents, contended that (1) it was previously held by the High Court that the alienation of the trust property was void and that a void agreement need not be set aside, and the suit brought is within time. (2) As to the improvements it is clear that the defendants cannot by spending large sums, out of their sweet will and pleasure, make it a charge upon the temple, and thus render it imposssible for the trustees to recover possession. The temple enjoys an income of only about Rs. 5,000 a year, and the defendants cannot compel the trustees to pay them the value of the gold Vahanams which they have made (3). The improvement effected must be commensurate with the income of the temple.

This appeal coming on for hearing on the 11th and 15th of February 1915, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—This is an appeal by some of the defendants against a decree in favour of the plaintiffs in a suit brought by certain trustees as *hukdars* of a temple to recover possession of the temple properties from the defendants (appellants) to whom the trustees had made over the management of the temple under an agreement, Exhibit I, dated 21st June 1901. Four questions were argued before us. In the *first* place it was said that the suit is bad for non-joinder, as, though all the *hukdars* including the 9th and 10th defendants were impleaded, the plaintiffs in paragraph 16 of the plaint stated that these defendants had lost the office owing to their neglect to discharge its duties, and that they were joined merely because they asserted a right to it. At the trial this contention was abandoned by the plaintiffs, and a decree was passed in favour of the 9th and 10th defendants with their consent as well as of the other defendants. In these circumstances, I do not think the decision in *Kokilasari Dasi* v. *Mohunt Rudranand Goswami* (1) cited for the appellants has any application. In that case the plaintiff persisted both in the original and the lower Appellate Court in denying the joint trusteeship of his minor brother whom he had made defendant; and it was only after this issue had been finally decided against him, that he applied in the second appeal that a decree might be passed in favour of himself and this defendant jointly. Here the contention was abandoned during the trial and the title of the defendants Nos. 9 and 10 as trustees was admitted.

The *second* contention was that the suit was barred by limitation under Article 91 of the Indian Limitation Act, as the plaintiffs did not sue within three years to set aside the transfer, Exhibit I. The High Court having already held that this transfer was void, Exhibit G, and this being so, it does not require to be set aside. The Limitation Act merely prescribes within what periods suits must be brought and cannot be construed as of itself creating an obligation to sue where none existed. In *Malkarjun* v. *Narhari* (2) their Lordships of the Judicial Committee clearly distinguished between sales which were a nullity and sales which were only voidable and valid until set aside. At page 350 after pointing out that the words "to set aside an adoption" in one of the articles were incorrect as an adoption may be declared invalid but cannot be set aside, their Lordships observed that there is no such difficulty in the case of suits to "set aside a sale" in the same Act, "because a sale valid until set aside can be legally and literally set aside; and anybody who desires relief inconsistent with it may and should pray to set it aside." See also *Sidhu Sahu* v. *Gopi Charan Das* (3). This is a more recent decision of their Lordships than *Gnanasambanda Pandara Sannadhi* v.

(1) 5 C. L J. 527.
(2) 25 Bom. 337; 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216 (P. C.).
(3) 18 Ind. Cas. 969; 17 C. L. J. 233.

Velu Pandaram (4) which is relied on by the appellants. In that case two persons Nataraja and Chockalingam shared the management of a religious endowment, and successively transferred their respective rights of managemant by registered instruments to a third party in 1868 and 1869, Chockalingam, who was a minor, being represented by his mother. In 1892 Velu, the son of Nataraja, sued to recover the trusteeship joining Chockalingam as defendant, as he was apparently unwilling to sue. Their Lordships held that Article 124 of the Indian Limitation Act was applicable and that, as the defendants had held adversely to the plaintiff's father, Nataraja, for more than twelve years, the plaintiff's suit was barred. They did actually rule, as contended by the appellants, that the suit was barred under Article 91 of the Indian Limitation Act because Nataraja had failed to set the transfer aside in three years which is what is now contended. Adverting to the case of the defendant Chockalingam, who was a minor at the date of the sale of his share, their Lordships, with a view of showing that his claim was also barred, observed that he attained majority in 1880 "and had by Article 44 of the Act three years for setting aside the sale by the guardian." Mr. K. Srinivasa Aiyangar relies on the fact that, although their Lordships might have simply said that Chockalingam had a further period of three years to sue under section 7, they expressly stated that he had three years under Article 44 which is for suits to set aside a sale by a guardian, although the sale was one which in an earlier part of the judgment they had held to be void; and he invites us to hold on this authority, that sales which are void *ab initio* become valid under the provisions of the Limitation Act if not set aside within three years by suit. Such a view, as already pointed out, appears to be inconsistent with another part of the same judgment and to be opposed to the rulings of their Lordships in the later case in *Malkarjun* v. *Narhari* (2), and we are not prepared to accept it as correctly representing what their Lordships intended to lay down. This very decision of their Lordships is express authority that Article 124 is the Article applicable, and under that Article the suit is not barred. The other cases cited were cases of sales by guardians which were not void and have no application to the present case.

The *third* point is as to the alleged improper rejection of evidence. It appears from the B diary that, after the evidence had been closed and during the arguments for the defence, it was observed that no issue had been framed about the validity of the agreement, Exhibit I, and leave was given to the plaintiffs to ask for a further issue on 11th April 1912. This, the 7th issue, is as follows:—

"Is the agreement and arrangement mentioned in the plaint as the one under which the defendants got into possession illegal and void in law, having regard to its nature, the circumstances and the objects for which it was made and are the plaintiffs entitled to all or any of the reliefs asked for; and if it is valid and legal under special circumstances and for special objects, are the circumstances and objects such as to make it valid and good?"

Reading this with the pleadings and with Exhibit I, the agreement in question, it would appear that the question intended to be raised was whether such an agreement of this nature, even if ordinarily void, might in special circumstances be valid and, if so, whether such special circumstances existed in the present case. At the further hearing, when the defendants wanted to call evidence as to the practice of the temple, the Subordinate Judge objected that this evidence should have been given at the trial of the other issues and that the question of usage did not arise on the seventh and other additional issues. We think the special circumstances mentioned in the issue referred to the recitals in Exhibit I as to the circumstances in which that document came into existence. It says nothing about a usage under which Exhibit I could be supported and we think the Subordinate Judge was justified in refusing to allow a defence of this kind to be raised at this late stage of the case.

The *fourth* question relates to the form of the decree which makes the appellants liable to account for what may be found due from

(4) 23 M. 271; 27 I A. 69; 4 C. W. N. 329; 2 Bom. L. R. 597; 10 M. L. J. 29.

them but gives them no right to recover anything that may be found due to them for expenses properly incurred out of their own pockets in the course of *de facto* management. It is contended that they are entitled to be reimbursed and to retain possession of the temple properties until they are so reimbursed. The decision, as yet unreported, in Appeal Suit No. 148 of 1910 on which the appellants rely, does not on examination support the proposition but rather the reverse, as it is mentioned in the judgments and appears from the printed papers that the *de facto* trustee in that case had in an earlier suit claimed to retain possession of the temple properties until he was reimbursed and that this claim was rejected by the District Judge whose decree was affirmed by this Court in Appeal Suit No. 147 of 1902. There is no reason for allowing trustees of public charitable endowments any larger rights against the trust property than are recognized in the case of private trustees by section 32 of the Indian Trusts Act. That section says that a trustee is entitled to reimburse himself all expenses properly incurred in connection with the trust and that he has a first charge enforceable only by prohibiting any disposition of the trust property without previous payment of such expenses not, that is to say, in the ordinary way by sale of the property subject to the charge. No authority has been cited before us to show that in the case of either private or public trusts the Court is bound to leave the trust estate in possession of a person not entitled to the character of a trustee merely because he has expended money on it whilst acting as trustee. On the contrary it would appear to be the duty of the Court, especially in the case of a public charitable trust to take the trust property out of the possession of persons not entitled to hold it, whilst making due provision for any claims they may have in respect of expenditure incurred in connection therewith.

Turning now to the facts of the present case, the defendants' case on the pleadings and at the trial was that they were entitled to remain in possession until recouped under an express agreement supplemental to Exhibit I. It is only after the rejection of this contention by the Subordinate Judge that the defendants fell back in appeal on this alleged equitable right. Apart from this we do not think the appellants are entitled to any modification of that part of the preliminary decree which directs the defendants to give up possession to the plaintiffs, but we are prepared to amend paragraph 2 of the preliminary decree by directing accounts to be taken in respect of the temple as between the plaintiffs and defendants Nos. 6, 8, 9 and 10 of the one part and defendants Nos. 2 to 5 and 11 to 13 of the other part, so as to enable the latter to establish any claim they may have against the trust properties on the taking of the accounts, leaving it to be determined by the final decree how such claim, if established, should be enforced. Otherwise the appeal fails and must, we think, be dismissed with costs. Fresh evidence may be taken if the modification of the preliminary decree should be found to render it necessary.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 76 OF 1914.

March 5, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

AUDIAPPA PILLAI—PETITIONER—APPELLANT

versus

NALLENDRAN PILLAI—RESPONDENT.

Guardians and Wards Act (VIII of 1890*), ss.* 17, 19—*Father marrying second wife, whether sufficient ground to deprive him of his children's guardianship—Guardianship of husband and father and of other relations, distinction between.*

The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children. [p. 5, col. 1.]

Bindo v. *Sham Lal*, 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22; *Gulbai and Lilbai, In re*, 32 B. 50; 9 Bom. L. R. 923, distinguished.

A distinction exists between the guardianship of a father or a husband and that of other near relations. The former could be deprived of the right of guardianship only *when he is found to be unfit to be the guardian of children or wife* and the latter, when it does not conduce to the welfare of the children. [p. 5, col. 1.]

Appeal against the order of the District Court of Trichinopoly, in O. P. No. 296 of 1913.

Messrs. *T. R. Ramachandra Aiyar* and *T. R. Krishnaswami Iyer*, for the Appellant.

RAM CHARAN *v.* BISMILLAH CEGAM.

Mr. *S. Varadachariar*, for the Respondents.

JUDGMENT.—The District Judge held that no circumstances have been proved which could deprive the father of the right of guardianship of his minor daughters. We agree with him. Mr. Krishnaswami Aiyar has taken us through the whole of the evidence; accepting in their entirety the depositions of appellant's witnesses, we are unable to find that any circumstance has been spoken to which would render the father unfit to be the guardian of his minor daughters. There is some evidence that the deceased mother of the girls was not properly treated: that is not a ground for presuming that the children will not be properly looked after. The eldest girl was 12 years of age at the time of the inquiry and the grandfather is unable to depose to any single act which shows that either the father or the step-mother ill-treated the girl. The fact that the father has married a second wife is not a sufficient ground for holding that he is unfit to be the guardian of his children.

The learned Vakil for the appellant relies on *Bindo* v. *Sham Lal* (1), which seems to lay down that if the father marries again he ought to be deprived of his legal right of guardianship. The learned Judges refer only to section 17 and say that the welfare of the girls is the primary consideration. There is no doubt that that would be the consideration which would influence the Court ultimately: at the same time, it ought not to be forgotten that the Legislature advisedly draws a distinction between the legal rights of husband and parents on the one side and those of the other near relations on the other side. In the first class of cases, it must be established that any act or conduct of the husband or father renders him unfit for guardianship: the fact that the child may be happier and more comfortable with other relations is not sufficient to deprive the two relations referred to of their right and duty. The same sanctity does not attach to the rights claimed by the other relations. It is for these reasons that section 19 of the Guardians and Wards Act lays down that the Court must be satisfied that the husband or the father is unfit to be the guardian of his wife or child respectively before it can appoint another person as the guardian. For these reasons we are unable to follow the decision in *Bindo* v. *Sham Lal* (1). The decision in *Gulbai and Lilbai, In re* (2) deals with guardianship of other near relations. To such cases section 19 does not apply and the only consideration which should weigh with Courts is the welfare of the minor. We think the order of the District Judge is right: we must dismiss this appeal. Having regard to the fact that the grandfather is deeply interested in the minors, we think the provision for consulting the Court before giving the girls in marriage is a salutary one. We see no reason to think that the security is not sufficient. We make no order as to costs.

Appeal dismissed.

(1) 29 A. 210; A. W. N. (1907) 24; 4 A. L. J. 22.

(2) 32 B. 50; 9 Bom. L. R. 923.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14 OF FARRUKHABAD DISTRICT.

March 20, 1914.

Present:—Sir Duncan Colvin Baillie, S. M.

RAM CHARAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat BISMILLAH BEGAM—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 50, 154, 3—Rent-free land—Resumption—Proceedings to have rent assessed—Rent not assessed—Suit for resumption, whether barred.

In 1869, a *zemindar* got a declaration that he had a right to have rent assessed on the rent-free land but got no rent assessed. In 1912 he brought a suit for resumption. It was contended that the only right of the *zemindar* was to have the rent assessed:

Held, that, under the present law as under the old law, the former proceedings were no bar to a proceeding for resumption. [p. 6, col. 1.]

Second appeal from an order of the Commissioner, Allahabad Division, dated the 4th September 1913, reversing that of the Assistant Collector of Farrukhabad District, in a case of resumption.

JUDGMENT.—The suit was for resumption of a service rent-free grant. The one point which calls for notice in connection with this appeal is the claim that because in 1869 it was declared by a Settlement Deputy Collector that the landlord had a right to have rent assessed on

this land, the landlord is now barred from suing for resumption and can only sue for assessment of rent. It is claimed that section 3 applies, that the appellant had acquired a right to hold this land on payment of rent and that the right so acquired is not affected by the passing of the Tenancy Act.

I am afraid that I cannot hold that there has been in this case any right acquired. The landlord in 1869 wished to declare that he could have rent for this holding and a declaration to that effect was made. The declaration was never given effect to and rent was never fixed, and I do not think that from those proceedings it can be inferred that the tenant had a right which barred the resumption if the *zemindar* desired to resume. Even under the present law which makes service grants liable to resumption, the alternative is offered to the *zemindar* of suing for assessment of rent, but this right to have rent assessed does not in any way imply that the right to resume is barred. I take it that the circumstances were similar then. In my opinion this appeal must be dismissed with costs on appellant.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 256 OF 1914.

February 24, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

VUPPALAPATI VENKATAPPA—DEFENDANT No. 2—APPELLANT

versus

THOVAGUNTA VIRARAGHAVAYYA AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3 TO 6—RESPONDENTS.

Execution against wrong representative—Sale—Property in hands of usufructuary mortgagee—Reversioner, suit by—Decree-holder purchaser, whether protected.

In a mortgage suit the mortgagee obtained a decree against the mortgagor and on the latter's death brought his widowed daughter-in law on the record while his widow was still alive. He then proceeded to execute the decree and purchased the property himself at the Court sale. At that time the property was in the hands of a usufructuary mortgagee and when the estate fell into possession, the reversioners sued to recover possession:

Held, that inasmuch as the property was in the hands of a usufructuary mortgagee at the time of sale, the purchaser acquired merely the equity of redemption and the sale could not be binding on the reversioners.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Appeal Suit No. 432 of 1911, preferred against that of the Court of the District Munsif of Ongole, in Original Suit No. 549 of 1909.

Mr. *P. Venkata Rama Rao*, for the Appellant.

Mr. *T. Narasimha Aiyangar*, for the Respondents.

JUDGMENT.—We think that the learned Judge was right in holding that the sale was not binding on the reversioners. Narasamma, who was brought on the record as the legal representative of Lakshami Devamma, could not in any view of the case have been her true legal representative. Her only possible interest in the property would have been as one entitled to claim maintenance from it and this interest could not have been affected by the sale. As a matter of fact she had not even that interest in it, as she had other property for securing to her her maintenance. The property at the time of the sale was in the hands of a usufructuary mortgagee, and the auction-purchaser acquired merely the equity of redemption, which amounted in effect to a right to possession 16 years after the sale. As soon as the time for redemption expired and the estate fell into possession, the reversioners instituted the present suit. In these circumstances the remarks of their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (1) seem to be directly applicable: "In the opinion of their Lordships, it is not a mere question of form but one of substance. In coming to this conclusion their Lordships are quite sensible of the importance of upholding the title of persons who buy under a judicial sale, but in the present case the real purchaser was the judgment-creditor, who must be held to have had notice of all the facts".

The decree of the lower Appellate Court is confirmed and the second appeal is dismissed with costs.

Appeal dismissed.

(1) 32 C. 296 at p. 315; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23 (P. C.).

ABDUL GHAFUR KHAN v. MUSHARRAF BI.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 128 OF 1910.
March 9, 1915.
Present:—Mr. Justice Johnstone and
Mr. Justice Shah Din.
ABDUL GHAFUR KHAN AND OTHERS—
DEFENDANTS—APPELLANTS
versus
Musammat MUSHARRAF BI AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Custom—Inheritance—Lodi Pathans *of Mustafabad, Ambala District—Presumption*—Onus.

In matters of inheritance *Lodi Pathans* of Ambala District follow agricultural custom and not their personal law, and the presumption is that among them first cousins succeed to ancestral estate in preference to daughters. [p. 8, col. 1.]

Where the daughters seek to rebut this presumption the *onus* lies on them to establish their prior right. [p. 8, col. 1.]

Musammat Ishar Devi v. *Bindraban*, 26 Ind. Cas. 686; 5 P. R. 1915; *Mowas* v. *Gulab Jan*, 24 Ind. Cas. 920; 121 P. W. R. 1914; 220 P. L. R. 1914; 97 P. R. 1914; *Nizam Din* v. *Shahab-ud-Din*, 108 P. R. 1900; P. L. R. 1900, p. 548, *Najabat Khan* v. *Abdul Rahman Khan*, 27 P. R. 1896; *Musammat Jiwi* v. *Sardar Khan*, 39 P. R. 1895; *Nizam Din* v. *Musammat Fariga*, 68 P. R. 1889, referred to.

Wazir Ali Khan v. *Musammat Asmat Bibi*, 61 P. R. 1902; 72 P. L. R. 1902, *Kutab* v. *Ismail*, 157 P. R. 1890; *Tari Baz Khan* v. *Fateh Khan*, 13 Ind. Cas. 316; 114 P. W. R. 1912; 29 P. R. 1912; 98 P. L. R. 1912, distinguished.

Second appeal from the decree of the Divisional Judge, Ambala Division, dated the 8th of November 1909, reversing that of the District Judge of Ambala, dated the 31st of March 1909, dismissing the suit.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Rai Bahadur Pandit *Sheo Narain* and Mehta *Bahadur Chand*, for the Hon'ble Mr. *Shadi Lal*, R. B., for the Respondent.

JUDGMENT.—This is a custom case in which the contest is between a first cousin (paternal uncle's son) of the deceased whose estate is the subject of the claim, and a daughter and daughter's daughter. The parties are *Lodi Pathans* of Mustafabad, District Ambala. The first Court framed seven issues and wrote an exhaustive and, barring a few unimportant slips, a careful and judicious order, dismissing the suit of the ladies for possession against the cousin. That Court, after disposing summarily but quite correctly of certain unimportant issues, turned to the issues on which the case really depends, namely, the second and third. On these it held that, inasmuch as no fraud, but only plaintiffs' own carelessness, is a cause of the belated amendment of the plaint so as to include the omitted *ala milkiyat* right, therefore, section 18, Limitation Act, could not help plaintiffs and the claim to that right is barred; that the widow of the last male holder succeeded as a life-tenant—as to this see *Mansoman* v. *Abdul Kadir* (1); that the parties in matters of inheritance are governed by custom and not Muhammadan Law; and that the plaintiffs have proved no special custom under which they can exclude a first cousin. Other points decided need not be detailed here. It will be seen that the Court laid upon the ladies the burden of proving a special custom and ruled that they had failed in this.

They appealed and the learned Divisional Judge accepted their appeal. His judgment is not easy to follow, but he seems to lay the *onus* on defendant and he decrees the whole claim. No good purpose would be served by analysing that judgment in detail, for this faulty laying of the *onus*, after first saying it was futile to discuss the question of *onus*, coupled with the rather surprising remark that it was immaterial whether these *Pathans* were agriculturists or not, vitiates the whole judgment. We will deal with the case on the merits, and briefly.

The case has been hotly contested and there is ample evidence for a decision on the question of custom. It is unnecessary to discuss the matter of the time-bar as regards the amendment of plaint, for on the merits we find the suit must fail *in toto*.

The land and houses in suit are ancestral. The defendant has been in undisputed possession from the death of the last male holder's widow in 1896 until 6th June 1908, all but 12 years later. Mustafabad is a large village, containing four *pattis* and inhabited by such tribes (in addition to the 11 families of these *Lodi Pathans*) as *Rajputs*, *Juts*, *Kazis*, *Chimbas* and so forth. These Pathans live by agriculture and have been settled in the village for hundreds of years, it is said since A. H. 725; and though they hold in *khud kasht* only seven ploughs out of 21 in their *patti*, it is said they have always held the same land

(1) 65 P. R. 1881.

from the beginning. In these circumstances following all the authorities, we can readily believe that they follow agricultural custom in matters of inheritance. That they do not follow their personal law is clear from many indications—indeed, they do not really pretend that they do, see the depositions of their witnesses. As they follow custom, there is certainly a reasonable presumption that among them first cousins would succeed to ancestral estate in preference to daughters. As to *onus* we need only refer without discussion to the analogous cases, *Musammat Ishar* v. *Bindraban* (2), *Mowas* v. *Gulab Jan* (3) (and the many authorities there quoted), *Nizam Din* v. *Musammat Fariga* (4), *Najabat Khan* v. *Abdul Rahman Khan*(5), *Nizam Din* v. *Shahab-ud-Din* (6), *Musammat Jiwi* v. *Sardar Khan* (7). Cases of *gifts* to daughters and of contest between remote collaterals and daughters, *e. g.*, *Wazir Ali Khan* v. *Musammat Asmat Bibi*(8), *Kutab* v. *Ismail* (9), *Tari Baz Khan* v. *Fateh Khan* (10), etc., etc., are not in point.

Have they rebutted that presumption? Mr. Sheo Narain, speaking for them, frankly admits that they have not, unless the instances that have occurred at Shahabad of daughters among *Lodi Pathans* excluding agnates are imported into the case. Now Shahabad is a town of over 10,000 inhabitants and has been a Municipality. It is 12 miles from Mustafabad and the only connection seems to be that the Pathans of the two places inter-marry. The conditions of life in the two places are so different that we do not think any safe deduction as to Mustafabad custom can be drawn from Shahabad.

And if we turn to Mustafabad itself and the seven villages near it in which *Lodi Pathans* live, the evidence is, strongly in favour of the defendant's contention. In those villages very many instances of exclusion of daughters by near agnates are proved, while not a single contrary instance is to be found. Then the cases in Mustafabad have been fully threshed out before us and in the lower Courts' judgments. As the first Court has pointed out, only one instance in that place in any way supports plaintiffs—Allahdi's case—and the decision there was ambiguous, it not being by any means clear that the real *ratio decidendi* was connected with the question now before us. Even if the case is really one of exclusion of near agnates by the daughter, it is insufficient by itself to rebut the presumption mentioned above *plus* the evidence of actual practice in Mustafabad and the near villages. It is unnecessary for us to go into greater detail in view of the undoubted fact, admitted by plaintiffs' Counsel, that, apart from the Shahabad instances, plaintiffs cannot prove their case.

We allow this appeal and dismiss plaintiffs suit with cost throughout.

Appeal allowed.

(2) 26 Ind. Cas. 686; 5 P. R. 1915.
(3) 24 Ind. Cas. 920; 97 P. R. 1914; 220 P. L. R. 1914; 121 P. W. R. 1914.
(4) 68 P. R. 1889.
(5) 27 P. R. 1896.
(6) 108 P. R. 1900; P. L. R. 1900, p. 548.
(7) 39 P. R 1895.
(8) 61 P. R. 1902; 72 P. L. R. 1902.
(9) 157 P. R. 1890.
(10) 13 Ind. Cas. 316; 29 P. R. 1912; 114 P. W. R. 1912; 98 P. L. R. 1912.

MADRAS HIGH COURT.

CIVIL APPEAL No. 19 OF 1914.

March 8, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

Sri HOTHA VIRABHADRAYYA PANTULU—CLAIMANT—APPELLANT

versus

REVENUE DIVISIONAL OFFICER, POLAVARAM (REFERRING OFFICER) AND ANOTHER—RESPONDENTS.

Land acquisition—Land acquired by Government—Apportionment of compensation amount between landlord and tenant—Muchilika *by tenant before Madras Estates Land Act giving up claim to compensation, effect of*—*Madras Estates Land Act (I of* 1908*), s.* 6 (1).

A *ryot* in occupation of "*ryoti* land" on the date the Estates Land Act came into force can also claim compensation in respect of the occupancy right conferred upon him by section 6 (1) of the Act when that land is acquired by Government under the Land Acquisition Act. A *muchilika* executed by a tenant prior to Madras Estates Land Act, relinquishing his claim for compensation, does not estop him from making the claim in view of the new right conferred upon him by the passing of the Estates Act. [p. 9, col. 2.]

Where there are distinct interests in the land, compensation awarded must be for both and not in respect of one alone. [p. 9, col. 2.]

PHULESARI *v.* SHUKUL RAJ SINGH.

Appeal against the order of the Court of the Government Agent, Godavery, in Revenue Case No. 188-*a*/Ag., dated the 28th June 1913.

FACTS.—Government acquired three items of land from the proprietor of the Gangole Estate for building a choultry. Two were pieces of dry land, and the third a piece of *jeroya'i* land under cultivation by a tenant. The *ryot* came into occupation of that item of land under three *muchilikas* *A*, *B* and *C*, executed before the Estates Land Act came into force, each of which contained the following clause:—

"If either you or the Government open roads, channels, etc., through the said lands, during the stipulated period, I shall have no concern in the compensation to be given by the Government either in respect of the said lands or fruit trees thereof. But it is agreed that the *cist* should be paid on the excess land, according to the aforesaid rates."

The landlord contended that under the above clause the tenant was not entitled to any share of the compensation paid by Government. The Land Acquisition Officer *i.e.*, the Deputy Tahsildar, referred the question to the Government Agent under section 18 of the Land Acquisition Act. He held that the Estates Land Act altered the *status* of the *ryot* and conferred upon him a permanent right of occupancy in the land; the *muchilikas* refer to a state of things before the Estates Land Act came into force, and the tenant is entitled to claim compensation in respect of the permanent right of occupancy conferred upon him by section 6 (1) of the Madras Estates Land Act. The present appeal is against that decree.

Mr. *V. Ramesam*, for the Appellant:—Even under the Estates Land Act, the agreement is not invalid, because there is nothing in the Act prohibiting such an agreement.

Mr. *V. Ramadoss*, for the Respondent:—The condition in the agreement may be valid before the Estates Land Act came into force, and not after when the tenant secured occupancy right in the land.

JUDGMENT.—We think the terms of the *muchilikas*, Exhibit A, etc., which were entered into before the passing of the Madras Estates Land Act, were intended to amount to an admission by the tenant that he had no permanent interest in the holding and no claim to any compensation in the event of its being acquired by Government. We think, however, that the *muchilika* must be read with reference to the state of things when it was entered into, and that the terms in question cannot be read as an agreement by the tenant to transfer to the landlord his right to compensation in respect of any interest in the holding which might afterwards be conferred upon him by the Legislature. We think, therefore, that the Government Agent was right in holding that the 2nd respondent was entitled to a share. As regards the amount of compensation, the Government Agent does not say that he has taken the tenant's interest into account and refers only to the landlord's interest. The value of the landlord's share as paid by him being Rs. 3 per annum, it is conceded that the tenant's interest may be estimated at a like amount and 20 years' purchase at Rs. 120 an acre be awarded for the whole with the usual 15 per cent., of which the appellant will be entitled to one-half and the 2nd respondent to the other half. The appellant must pay the 2nd respondent's costs of the appeal and will recover proportionate costs against the 1st respondent who has not entered an appearance.

Appeal partly allowed; Decree modified.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 21 OF 1912-13 OF AZAMGARH DISTRICT.

August 15, 1913.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

Musammat PHULESARI—DEFENDANT—APPELLANT

versus

Babu SHUKUL RAJ SINGH—PLAINTIFF—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—Succession—Uncle, whether can succeed to nephew's holding—Cultivation, sharing in.

An uncle who shared in cultivation of an occupancy holding with his nephew at the time of the latter's death is entitled to inherit the nephew's holding. [p. 10, col. 1.]

Second appeal from an order of the Commissioner of the Gorakhpur Division,

dated 12th March 1913, reversing that of the Assistant Collector of Azamgarh District in the case of ejectment.

JUDGMENT.

TWEEDY, J. M.—Paltu and Meet were joint occupancy tenants of a holding. They died of cholera practically at the same time, aged 14 and 16. Their uncle Padarath undoubtedly helped them in their cultivation and on their death claimed the occupancy holding by virtue of inheritance. Padarath has a separate occupancy holding and the Commissioner has found that he was not a sharer in the holding but a manager and that as he had his separate cultivation he had no title to succeed.

There is practically no dispute about the facts and the question is whether the Commissioner has drawn a correct inference from those facts. I think not. When the boys died, they were quite able to join in cultivation and it is to my mind proved that their mother Phulesari and they with their uncle's help ran the holding. Padarath no doubt had separated from his brothers, but the circumstances are such as to raise the presumption that he and his nephews had re-united. I would decree the appeal as far as Padarath is concerned with costs and restore the holding of the Assistant Collector.

BAILLIE, S. M.—I concur.

Appeal allowed: Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2398 OF 1912.

February 23, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

KALIAPERUMAL KEERUDAYAN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

CHIDAMBARAM THANJIRAN—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 142,144—Suit for possession—Plaintiff, what must prove—Adverse possession pleaded—Possession within 12 years, proof of—Defendants' inability to prove possession continuously for 12 years—Presumption—Possession under illegal order, effect of.

In a suit for possession the plaintiff must prove not only that he is entitled to the property but also (if and in so far as that is contested) that he has not been out of possession during the whole of the 12 years preceding his suit. The facts that the defendants are not able to establish affirmatively that they have been continuously in possession for the said period of 12 years under Article 144 of the Limitation Act does not necessarily entitle the plaintiff to succeed unless the requirements of Article 142 are also satisfied. [p. 11, col. 1.]

In calculating the said period of 12 years, possession under an illegal order should not be taken into account. [p. 11, col. 1.]

Motee Singh v. *Rajah Leelanand Singh*, 11 W. R. 49, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Tanjore in Appeal Suit No. 907 of 1910, preferred against that of the Court of the District Munsif of Tanjore in Original Suit No. 216 of 1909.

Mr. *N. Rajagopala Chariar*, for the Appellant.

Messrs. *K. Ramanath Shenai* and *P. Ramanathan*, for the Respondents.

FACTS.—Plaintiff in this suit is Chidambara Thanjiran and the defendants Nos. 1 and 2 are sons of one Amirthalinga Keerudayan. The property in dispute originally belonged to one Muthusami Thanjiran, who sold it to the present plaintiff on 16th February 1888 under Exhibit F which was registered on 22nd March 1888.

Within a month of the registration of the said sale-deed, the plaintiff's vendor Muthusami mortgaged the same property with possession to defendants' father Amirthalinga Keerudayan on 19th April 1888 under Exhibit XI for a sum of Rs. 200.

Plaintiff's case is that after sale to him under Exhibit F and at the same time, he allowed his vendor Muthusami to be in possession of the land on an oral lease. Plaintiff further contends that as per this oral lease, his vendor was in possession and enjoyment of the land, giving him *muktha* every year. The tie is between the present plaintiff and Amirthalinga's sons claiming the same property from the same person by virtue of a sale-deed in favour of plaintiff and a mortgage in favour of the defendants' father.

Plaintiff contends that the mortgage in favour of Amirthalinga Keerudayan under Exhibit XI is only a sham and collusive

transaction and that Amirthalinga Keerudayan never got possession of the property and was never in possession and enjoyment of the same.

This second appeal coming on for hearing on the 30th and 31st July 1914, the Court delivered the following

JUDGMENT.—The learned Subordinate Judge has, it seems to us, overlooked the bearing of Article 142 of the Limitation Act. The plaintiff must prove not only that he is entitled to the property, but also (if and in so far as that is contested) that he has not been out of possession during the whole of the twelve years preceding his suit. The fact that the defendants are not able to establish affirmatively that they have been continuously in possession for the said period of twelve years under Article 144 of the Limitation Act does not necessarily entitle the plaintiff to succeed unless the requirements of Article 142 are also satisfied. We must call for a finding, therefore, on the following issue: "Whether at any time within twelve years from the date of the suit the plaintiff or his predecessors-in-title were in possession of the property referred to in the plaint."

In answering this question the Subordinate Judge will not consider the possession which was given to the plaintiff on the 24th October 1907 under the decree in Second Appeal No. 164 of 1903 on the file of the High Court. That decree was passed when the father of the present appellants stood on the record as a party respondent, though he had then died and his legal representatives had not been brought on the record. The decree was consequently not binding on the appellants and the delivery of possession on the 24th of October 1907 was cancelled for all legal intents and purposes when the possession was ordered to be re-delivered to the appellant in May 1908. In this connection we follow the decision of Loch, J., in *Motee Singh* v. *Rajah Leelanund Singh* (1) though it was dissented from by Glover, J.

Fresh evidence may be given by either party.

The finding should be submitted within six weeks from this date and seven days will be allowed for filing objections.

(1) 11 W. R. 49.

FINDING.— * * * *

I find the issue for defendants and against plaintiff.

This second appeal coming on for final hearing after the return of the above finding from the lower Appellate Court upon the issue referred to it for trial, the Court delivered the following

JUDGMENT.—We accept the finding and allow the appeal, dismissing the suit with costs throughout.

Appeal allowed; Suit dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 13 OF 1912-13 OF FATEHPUR DISTRICT.

December 5, 1913.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

GAURI SHANKAR—APPELLANT

versus

AMBIKA PRASAD—RESPONDENT.

Landlord and tenant—Tanks in villages, ownership in—Presumption—Entry in papers on basis of possession—Evidence of permission to make tanks—Burden of proof.

There is no persumption of law or custom that the ownership in the tanks situate in a village vests in the *zemindar*. They belong to the proprietor if he has made them or to the tenant if he has made them. Entry in the papers must be made on the basis of possession and a tenant should not be asked to give in every case evidence of the *zemindar's* permission to make it. [p. 12, col. 1.]

Appeal from an order of the Commissioner, Allahabad Division, dated 1st April 1913, reversing that of the Settlement Officer of Fatehpur District in the case of correction of papers.

JUDGMENT.

BAILLIE, S. M.—The dispute is as to the record to be made in regard to an old tank. It is clear that the entry to be made must be on the basis of the possession, and on this ground it was decided in favour of the appellant by the Settlement Officer. The Commissioner lays down that village tanks are by common custom the property of the land-holders to whom the village belongs and that if a tenant claims a tank as his own, he must be prepared to prove this, to show that he got permission to make it and on the understanding that it would be his own when made. In my opinion both

these grounds are baseless. There is no custom as to the ownership of tanks; they belong to the proprietor if he has made them; they belong to a tenant if he has made them. There is no provision of law by which a tenant claiming a tank must give evidence of his permission to make it and of an understanding that it would be his own when made. The tank now in question is a very old one and it seems to me absolutely unreasonable to suggest that evidence of permission to make it in favour of the grand-father of the appellant should now be demanded. In my opinion the Settlement Officer was right in deciding on the basis of possession and his order should be restored. I would allow this appeal and restore the order of the lower Appellate Court. Costs on respondent.

TWEEDY, J. M.—I concur.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL FROM ORIGINAL CIVIL SUIT NO. 31 OF 1914.

February 24, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Musammat KHADER UNNISSA BEGAM—PLAINTIFF—APPELLANT

versus

MUHAMMAD MUSTAN ALI BADSHA SAHIB—DEFENDANT—RESPONDENT.

Malicious prosecution—Want of reasonable and probable cause—Malice, proof of—Complaint false to the knowledge of defendant—Plaintiff guilty of some dishonest act—Defendant not justified in making false allegations.

In a suit for damages for malicious prosecution, not only want of reasonable and probable cause but also malice is proved if the complaint was false to the knowledge of the complainant. The fact that the plaintiff was guilty of some other dishonest act will not justify the defendant in making allegations against his conduct false to his knowledge.

Bhim Sen v. *Sita Ram*, 24 A. 363; A. W. N. (1902) 92; *Abrath* v. *North Eastern Railway Company*, (1886) 11 A. C. 247; 55 L. J. Q. B. 457; 55 L. T. 63; 50 J. P. 659, followed.

Appeal from the judgment of the Hon'ble Mr. Justice Sankaran Nair, in the exercise of the ordinary original civil jurisdiction of this Court in Civil Suit No. 95 of 1913.

Mr. *M. K. Ramaswami Aiyar*, for the Appellant.

Mr. *C. Venkatasubbaramiah*, for the Respondent.

JUDGMENT.—The finding of the learned Judge is that the defendant's complaint against the plaintiff was false and the facts found further show that the complaint was false to the knowledge of the complainant. When a complaint is false *to the knowledge of the complainant*, not only is want of reasonable and probable cause proved but malice also is proved. See *Bhim Sen* v. *Sita Ram*(1) and *Abrath* v. *North Eastern Railway Company* (2). We are unable to agree with the learned Judge that because the defendant had grounds for suspecting the plaintiff or her husband of having committed some wrongful act in connection with the defendant's daughter's jewels, the defendant could not be deemed to have been actuated by malice in himself bringing a case on allegations false to the defendant's knowledge.

On the evidence we hold that Rs. 1,000 (thousand rupees) is a fair sum to be awarded to the plaintiff as damages.

We set aside the Judge's decision and pass a decree in the plaintiff's favour for Rs. 1,000 (thousand rupees) and costs in both Courts.

Order set aside.

(1) 24 A. 363; A. W. N. (1902) 92.
(2) (1866) 11 A. C. 247; 55 L. J. Q. B. 457; 55 L. T. 63;50 J. P. 659.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 931 OF 1912.

September 19, 1913.

Present:—Sir Charles Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

CHITIBOBU ADENNA AND OTHERS—DEFENDANTS - APPELLANTS

versus

GARIMALLA JAGGARRAYADU—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 4—Acceptance subject to a condition subsequent—Auction sale—Bidder benamidar—*Fraud — Misrepresentation — Repudiation of contract—Specific performance*—Benamidar *can sue—Exchange of* patta *and* muchilika *does not give title.*

CHITIBOBU ADENNA *v.* GARIMALLA JAGGARRRYADU.

Where an auction-sale conducted through an agent has been confirmed in the name of the highest bidder subject to the approval of the principal, there is a contract of sale on the grant of the approval. [p. 13, col. 2.]

Where there is an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, there is a contract, if that condition subsequent is satisfied. [p. 13, col. 2.]

In the absence of any restriction in the conditions of sale that bids must be made in the bidder's own interest and not on behalf of anybody else, the mere fact that a person was acting on behalf of somebody else when he made a bid, would not make it fraudulent, nor would it amount to such misrepresentation or suppression of material facts as to entitle the other party to repudiate the contract. [p. 14, col. 2; p. 15, col. 1.]

In a suit for specific performance it cannot be successfully pleaded in defence that the man who has entered into the contract for specific performance is not the man who has the beneficial interest. [p. 15, col. 1.]

An exchange of *patta* and *muchilika* or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent, but the mere exchange of *patta* and *muchilika* does not give title. [p. 15, col. 1.]

Second appeal from a decree of the Court of the Temporary Subordinate Judge of Vizagapatam, in Appeal Suit No. 129 of 1910, preferred against that of the Court of the District Munsif of Chodavaram, in Original Suit No. 810 of 1908.

Mr. *B. N. Sarma*, for the Appellants.

Mr. *S. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.

WHITE, C. J.—Two questions, it seems to me, arise for consideration in this appeal. *First*, was there a contract between the 1st defendant and the Maharajah acting through his agents, on the strength of which the 1st defendant had a good defence to the plaintiff's claim in the ejectment and which would entitle the 1st defendant to remain in possession of the lands in question? *Secondly*, assuming there was a contract, was the Maharajah, entitled by reason of the events which happened to withdraw his consent and to repudiate the contract and to deal with the lands as if no contract had been entered into?

The *first* question turns mainly on the documentary evidence. The 1st document is Exhibit I. This is a record of the sale, as I understand it, of the right of occupancy in the lands in question. The 1st defendant was the highest bidder and we find this statement in the document, that as the 1st defendant "bid the last bid for one hundred and fifty rupees, and as no other bid for more than that it (the sale) has been confirmed in the name of the highest bidder, Chitibobu Adenna, subject to the approval and orders of the special agent, Vizianagaram Samastanam." That is dated 8th July 1907. Then on August 16th we have a document which embodies the approval of the special agent. That document, which is Exhibit V, is in these terms: "The leasing out of the said *patta* lands for settlement cowle for *Fasli* 1317 to Adenna Chitibobu (the 1st defendant) according to the *amin's* recommendation has been approved. It must be duly given effect to". On August 29th we have an application by the plaintiff for a cowle of the lands in question. That is Exhibit L. On September 6th we have a document, Exhibit H, which amounts to a grant of the lands in question to the plaintiff, who is now seeking to eject the defendants. The terms of that order are very similar to the terms of the document which embodies the approval by the special agent of the confirmation of the sale by the *amin* in favour of the 1st defendant.

Mr. Srinivasa Aiyangar has contended that Exhibit I was nothing more than an offer by the 1st defendant to the *amin*. He says that, that being so, there was no contract between the parties because the communication of the acceptance by the agent of the Maharajah was not complete (we must take it as a fact that the acceptance was not communicated to the 1st defendant). He relies on section 4 of the Contract Act: "The communication of an acceptance is complete.....as against the acceptor when it comes to the knowledge of the proposer." If Exhibit I were nothing more than an offer made through the *amin* and all that the *amin* had said was "You have made an offer; I will communicate it to my superior officer and see if he is prepared to accept it," then, no doubt, Mr. Srinivasa Aiyangar's contention under section 4 of the Contract Act would be good. But it seems to me that Exhibit I is a great deal more than that. It seems to me that it amounts to an acceptance on behalf of the principal of an offer which has been made subject to a condition subsequent, and that, if that

condition subsequent is satisfied, then there is a contract. That the special agent in fact approved is not denied.

I will take it to be the case that the onus is on the 1st defendant to establish that the confirmation which the *amin* purported to give to the sale, was an act within the scope of his authority. If the onus is on the 1st defendant—I am not quite sure that it is—we have to consider what there is to satisfy that onus. We have been referred to a document, Exhibit D, which purports to define the scope of the agent's authority. We find in it a direction to the *amin* from the special agent that "the usual auction must be held and a full report should be sent....Everything should be done subject to the approval of the undersigned". I do not think the latter sentence carries the case much further, because nobody denies that what was done under Exhibit I was subject to the approval of the special agent. We have the words "the usual auction must be held." That seems to me to indicate that what took place when the 1st defendant was the highest bidder was in accordance with the usual practice. I think it may fairly be assumed that the terms which are embodied in the document, represent the usual practice which prevailed when a sale by auction took place by the *amin*. There can be no question that the *amin* purported to confirm the sale in favour of the 1st defendant subject to the approval and orders of the special agent, and if the onus is on the 1st defendant to show that the *amin* in so acting was acting within the scope of his authority, I think there is evidence to show that when the *amin* purported to confirm the sale subject to the condition subsequent, he was acting within the powers which were entrusted to him as agent.

As regards this part of the case, Mr. Srinivasa Aiyangar cited several authorities, but I do not propose to deal with them as the question here really turns upon the construction of instrument, and upon the facts of this particular case, I think there was a contract between the 1st defendant and the Maharajah's representatives.

The *second* question is, was the Maharajah entitled in the events which happened to repudiate the contract? It is contended that he was, as soon as he ascertained that the 1st defendant had not entered into the contract on his own behalf but on behalf of another man. The learned Judge would seem to a great extent to rest his judgment on this part of the case on the ground of fraud. He says in one part of the judgment: "If the 1st defendant did not inform the *amin* that he was bidding for the 4th defendant he committed a fraud." Further on he says: "The very fact that the 1st defendant concealed from its knowledge that he had bid for the 4th defendant would amount to a fraud practised by him on it. (the *samasthanam*)." It is admitted that the 1st defendant in bidding was not acting on his own account but was acting as a name-lender for or on behalf of another party, *i. e.*, the 4th defendant. I cannot take the view of the learned Subordinate Judge that the fact that the 1st defendant was a *benamidar* acting for some other man was in itself fraudulent and would entitle the Maharajah to withdraw his consent and to repudiate the contract. The relations between the 1st defendant and the 4th defendant are clear enough. They are to be found in Exhibit VII, which is a letter from the 1st defendant to the 4th defendant in respect of this transaction and the release deed (Exhibit VIII). These documents show that the 1st defendant intended that the 4th defendant should have the benefit of this transaction and that he should have possession of the lands. As I have said there is nothing fraudulent in the fact that the 1st defendant was a *benamidar*.

Then can it be said that there was such misrepresentation or suppression of material facts, as would entitle the Maharajah to withdraw his approval and repudiate the contract. It must be observed that this is not a personal contract, that it is not one of the class of cases in which one party to the contract may be said to rely on the personal qualities or personal character of the other. It is a contract to put a man in possession of land. It is conceded that, if a formal lease had been given to the 1st defendant, nothing could have prevented him from assigning the rights which he had acquired to anybody he pleased. That being so, I am certainly not prepared to hold from the mere fact that he was acting on behalf of somebody else when he made the bid and when the sale was confirmed in his favour with the condition to which I have referred,

that the 1st defendant was either misrepresenting things or suppressing material facts so as to entitle the Maharajah to say, 'in view of certain facts which have been brought to my notice since I gave my consent, I withdraw my consent and repudiate the contract." There was no restriction of any sort or kind in the conditions of sale which provided that bids must be made in the bidder's own interest and not on behalf of anybody else. I do not think that any case could be found in which a defence to a suit for specific performance had been successfully set up to the effect that the man who had entered into the contract for specific performance was not the man who had the beneficial interest.

It was further contended by Mr. Srinivasa Aiyangar that the Maharajah had the right to withdraw his consent because, as I understood his argument, the title of the 1st defendant was not complete since there had been no exchange of *patta* and *muchilika* as between him and the Maharajah. No doubt an exchange of *patta* and *muchilika* or an agreement to dispense with the exchange of *patta* and *muchilika* is a condition of the right to recover rent. But I do not think it has ever been suggested that the exchange of *patta* and *muchilika* gives title. No doubt the parties contemplated that something further should be done after the agent's consent was given, but this was not necessary for the completion of the 1st defendant's title. For these reasons I think that the District Munsif is right and that we should set aside the decree of the Subordinate Judge and dismiss the suit with costs throughout.

SANKARAN NAIR, J.—I agree.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1183 OF 1913.

April 9, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir P. C. Banerji, KT., and Mr. Justice Tudball.

Musammat LAHASO KUNWAR—PLAINTIFF—APPELLANT

versus

MAHABIR TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Joint land—Long exclusive possession of one co-sharer—Building, erection of—Presumption—Other co-sharer, right of, to demolish.

Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. [p 16, col. 1.]

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 30th July 1913.

Mr. *S. K. Dar*, for the Appellant.

Mr. *Lakshmi Narain* (for Mr. *M. L. Agarwala*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought a declaration that the share of the plaintiff and the defendants Nos. 38 and 39 amounts to $\frac{3}{8}$ths in a plot No. 703, and that she might have a decree for joint possession of the plot and for removal of a thatch and for the restoration of a ditch said to have been filled in. Notwithstanding the pleadings it is quite clear that the (contesting) defendants' contention was not that the plot in question did not form part of the joint property of the co-sharers, but that they for a very long time had been in possession and had sunk a well and made certain constructions. In the lower Appellate Court the defendants raised no controversy as to the proprietary title of the parties to the plot in question. All that they contended was that having regard to the long time they had been in possession, the plaintiff was not entitled to put them out or to have the constructions demolished. It is perfectly clear that in the event of a partition the plot in question will have to be taken into consideration. The authority making the partition will have regard to the rules that as far as

possible parties in possession shall be left in possession and if that is found to be impossible and a certain plot (on which are buildings) in the possession of one party has to be put into the lot of another, rent will be assessed. Where one co-sharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. We think that the view taken by the Court below was correct and ought to be affirmed. There is no question of adverse possession in the case. We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 96 OF 1913.

March 1, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

GURRALA SESHAYYA AND ANOTHER—DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

YEDIDA VENKATASUBBIAH—RESPONDENT.

Limitation Act (IX of 1908), *Sch. I, Art.* 182—*Limitation, saving of—Application only necessary—Return of application for amendment and failure to re-present, immaterial.*

Article 182 of Schedule I of the Limitation Act only requires that there should be an application. The fact that an application was returned to the decree-holder for amendment and was not re-presented, would not affect limitation.

Appeal from an order of the Court of the Subordinate Judge of Bezwada, in Appeal Suit No. 96 of 1913 (Appeal Suit No. 352 of 1912 on the file of the Court of the Subordinate Judge of Kistna at Ellore), preferred against that of the Court of the District Munsif of Ellore, in Execution Petition No. 873 of 1910, in Original Suit No. 31 of 1896.

Mr. *P. Narayanamurthi*, for the Appellants.

JUDGMENT. The Subordinate Judge holds that as the applications of the year 1907 and 1908 were returned for amendment

to the decree-holder and not represented by him, they would save limitation. He relies upon *Gopal Sah* v. *Janki Koer* (1) in support of this view. Article 182 of the Limitation Act only requires that there should be an application. The fact that it was not re-presented would not affect limitation. *Gopal Sah* v. *Janki Koer* (1) was dissented from in Civil Miscellaneous Appeal No. 322 of 1913 [*Vadivelu Pillai* v. *Maruda Pillai* (2)]. See also *Srinivasa Aiyangar* v. *Tirumalai Chetty* (3). We are not prepared to follow the Calcutta decision.

The lower Appellate Court is in error in saying that when the applications of 1907 and 1908 were made, the decree was in the Rajahmundry Court. The B diary shows that there must have been a re-transfer. Moreover the District Munsif, who may be presumed to know how his record stands, does not say that at the time the two applications were made, the Ellore Court had no jurisdiction. We must reverse the order of the Subordinate Judge and remand it for disposal according to law.

Costs will abide the result.

Order reversed.

(1) 23 C. 217.
(2) 26 Ind. Cas. 413.
(3) 23 Ind; Cas. 991; (1914) M. W. N. 372; 15 M. L. T. 337.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 2 OF 1912-13 OF ETAWAH DISTRICT.

August 5, 1913.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

JATA SHANKAR—PLAINTIFF—APPELLANT

versus

RAM DAT—DEFENDANT—RESPONDENT.

U. P. Land Revenue Act (III of 1901), *s.* 172—*Mango trees—Standing timber—Sale whether can be set aside by deposit—U. P. General Clauses Act (I of* 1904), *s.* 4 (23)—*Immoveable property—Standing timber.*

The mango trees when sold with the intention that they should be cut down and taken away by the purchaser are standing timber. Under section 4, clause 23 of the United Provinces General Clauses Act immoveable property does not include standing timber and, therefore, a sale of them cannot be set aside by deposit of money under section 172 of the Land Revenue Act. [p. 17, col. 1.]

MAUNG MAUNG *v.* SAN NYEIN.

Second appeal from an order of the Commissioner, Allahabad Division, dated the 22nd October 1912, upholding that of the Collector of Etawah District in the case of a suit for sale of trees in default of payment of rent.

FACTS.—A grove of mango trees was sold on account of arrears of revenue and purchased by appellant.

The owner of the grove deposited in the Collector's office under section 172 of the Land Revenue Act the money necessary under that section to set aside the sale, and applied to set aside the sale. The purchaser objected on the ground that section 172 applied to immoveable properties but that the mango trees were moveable property. The Collector set aside the sale. On appeal, the Commissioner passed the following order on 22nd October 1912 :—

"The question is whether a grove of mango trees is moveable property for the purpose of section 146 (*c*) of Land Revenue Act. According to the definition in the Registration and Transfer of Property Acts, standing timber is moveable property. The reverse is the case, I may perhaps note, according to the Penal Code. The Revenue Act, section 193 (*k*), compels the inference that standing timber is not moveable property in Revenue Law. As far as my experience goes, groves are always treated by Revenue Officers as immoveable property. The Collector was not authorised to sell the grove and his order setting aside his order of sale must be upheld. I dismiss the appeal."

On a further appeal to the Board it passed the following

ORDER.

BAILLIE, S. M.—There is no doubt as to the law applicable in this case. The United Provinces General Clauses Act interprets the language of Provincial Acts, unless there is something repugnant in them. According to that Act, section 4, clause 23, immoveable property does not include standing timber.

There remains the question whether mango trees are standing timber. The question has to be decided in consideration of the circumstances in which the trees were sold. If as is claimed by the appellant they were sold with the intention that they should be cut down and taken away, they were undoubtedly standing timber. In these circumstances the Collector had no right to set aside the sale which, therefore, must hold good. I would allow this appeal with costs on respondents. Pleader's fee Rs. 10.

TWEEDY, J. M.—I agree.

Appeal allowed.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 38 OF 1913.

March 22, 1915.

Present:—Sir Charles Fox, KT., Chief Judge, and Mr. Justice Parlett.

MAUNG MAUNG—PLAINTIFF—APPELLANT

versus

MAUNG SAN NYEIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution sale—Auction-purchaser's right—Mistake or oversight in procedure, effect of.

When the auction-purchaser, in execution sale of a mortgage decree is claiming possession from persons who could claim only through one or more of the mortgagors and whose claim has been declared unfounded, a mistake or oversight in the proceedings cannot affect the real substance and subject of the litigation between the mortgagors and the mortgagee. [p. 19, col. 2.]

Balwant v. *Hirachand*, 27 B. 334; 5 Bom. L. R. 217, *Mahomed Kala Meah* v. *A. V. Harperink*; 1 Ind. Cas. 122; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J 165; 11 Bom. L. R. 227; 36 C. 322; 19 M. L. J. 115; 36 I. A. 32 (P. C.); 5 L. B. R. 25, referred to.

Mr. *N. N. Burjorjee*, for the Appellant.

Mr. *Higginbotham*, for the Respondents.

JUDGMENT.

FOX, C. J.—The first and second defendants-respondents are the sons of Maung Po Maung and Ma Me: the other defendant-respondent is a Receiver appointed in a suit by a mortgagee against the above persons and one Po Nwai on a mortgage of the property in dispute. On the 11th November 1904 Po Maung, Ma Me, Maung Po U and Ma Mi executed a document, Exhibit B, by which they agreed that if they failed to re-pay to S. R. M. A. Pallaneappa Chetty Rs. 30,000 and interest by a specified date in the following year, they would make over outright a piece of land situate on the Western Bank of Thongwa Creek bounded on the east by Hmaw-wun river, on the

west by Po Thi's paddy land, on the south by Maung On Saing's paddy land, and on the north by Po Thi's garden together with the rice mill standing thereon.

The money not having been paid, Pallaneappa Chetty on tbe 2nd July 1907 filed a Suit (No. 43 of 1907) against the executants of the document Exhibit B, in which his case was that he had lent the Rs. 30,000 to enable them to erect a rice mill on the land, and that the defendants by the document agreed to execute a legal mortgage of the land and the rice mill erected on it, but they had failed to do so. He asked for specific performance of the agreement to mortgage and for a mortgage decree. In the first paragraph of the plaint, the property in respect of which he made his claim to a mortgage was described as

"that piece of land situated within the jurisdiction of this Hon'ble Court and known for the year 1904-1905 as Holding No. 53, in Thongwa Kwin Yone Circle, Hanthawaddy District, with the rice mill, granaries and buildings thereon."

In paragraph 4 and in the second prayer of the plaint the rice mill, granaries and other buildings are referred to as commonly known as No. 2 Thongwa Rice Mill.

The number 53 was not the correct number of the holding on which the rice mill and buildings stood. The land included within the boundaries given in the agreement was not one holding. Part of it was garden land and this was Holding No. 53: the other part on which the mill and its buildings had been erected was Holding No. 43.

Pallaneappa Chetty must have intended to enforce the agreement to sell outright as stated in Exhibit B, or to mortgage, as by his plaint he admitted the agreement to have really been, over all the land included within the boundaries stated in the document, but he failed to verify the correct revenue holding number of the land before he filed his suit.

Po Maung, who was the Circle Thugyi of the part in which the land is, and Ma Me, his wife, filed a written statement which foreshadowed the chicanery in which they subsequently indulged. The 4th paragraph of this written statement indicates that they knew that the Chetty had made a mistake about the holding number of the land on which the mill stood. It implies that they had offered to mortgage the garden land (Holding No. 53) but the Chetty had refused to accept a mortgage of this, although it was all that he was in any event entitled to. The suit, however, was not fought ont. All the parties signed a petition stating that it had been compromised on terms set out in the petition, and asking that a decree might be passed in accordance with those terms. By these the Chetty abandoned a considerable portion of his claim on condition of being paid the principal due to him by a certain date, but if it was not paid by such date the decree was to be a mortgage decree for the full amount due to him, and the premises described in paragraph 1 of the plaint were to be sold to sastisfy the decree.

On the 31st August 1908 an order absolute was made for the sale of "a peice of land known as Holding No. 53 of 1904-05 situate in Thongwa Kwin Yone Circle, Thongwa Township, Hanthawaddy District, measuring 3·57 acres with the rice mill, granaries and buildings thereon." The proclamation of sale and subsequently the sale certificate described what was to be sold and was sold in the same terms. The plaintiff in the present suit was the purchaser at the auction sale which took place on the 24th July 1909, and he paid Rs. 26,200 for what he bought.

In the meanwhile Po Maung and Ma Me had made various attempts to defeat and delay their creditor. In December 1908 they petitioned the Court asking for an enquiry as to whether the Chetty had not lost all rights to a lien over any of the property. In the petition (Miscellaneous Case No. 195 of 1908) they asserted that the compromise was come to because the Chetty was fully aware that only the piece of garden land, Holding No. 53, was the subject-matter of the suit.

In October 1908 their sons, the 1st and 2nd defendants in the present case, applied that the sale of the mill and buildings might be stayed on the ground that these belonged to them, and were not liable to be sold in satisfaction of the decree against their parents who had never been owners or in possession.

Again on the 19th July 1909 these young men filed a suit against the Chetty, their parents, and their aunt, Ma Me, and her husband, Po U, the present plaintiff, being subsequently joined as a party, in which they asked for a declaration that they were the owners of the piece of land on which the rice mill, granaries and other buildings stood, that is, of Holding No. 43 of 1904-05.

This suit was decided against them : the decision is conclusive that they have no right whatever to the land or to the buildings thereon.

It is unnecessary to set out in detail the dodgery by which it was sought to establish that these two young men had become the owners of the land and buildings. Unfortunately by means of some of this dodgery, Po Maung, Ma Me and their two sons were enabled to impose on the Bank of Bengal, and to induce its then manager to accept Holding No. 43 of 1904-05 and the rice mill, etc., on it as security for a large advance made by it.

The plaintiff auction-purchaser, not having been able to obtain possession of what he bought, brought the present suit to obtain it. One would have thought that the decision in the first and second defendants' previous suit would have been sufficient to deter them from contesting the suit, but they have contested it on practically the same grounds as their own suit was fought on.

The District Judge found in favour of the plaintiff on all contested facts. He decided, however, against him on legal grounds raised by himself. In his profuse and minute examination of the legal intricacies which occurred to him he appears to have lost his way in the maze he created for himself.

The result of the first and second defendants' Suit No. 73 of 1909 having been that they failed to prove that they were the owners of the rice mill, granaries and buildings on Holding No. 43 of 1904-05, the only matter left to be determined as between the plaintiff and them was whether the plaintiff had bought the rice mill and other buildings and the land on which they stood. What "he bargained and paid for" in the words of the Privy Conucil quoted in *Balwant* v. *Hirachand* (1), was certainly rice mill buildings and the land on which they stood. No one in his senses would have paid Rs. 26,200 for 3·57 acres of garden land in a village in the country far away from a large town. There can be no possible doubt as to which rice mill, etc., was sold. None of the defendants in Suit No. 43 of 1907 could now be heard to say that the compromise decree did not cover the whole of the property over which Pallaneappa claimed to have a mortgage-decree or a mortgage. On the principles adverted to by the Privy Council in *Mahomed Kala Meah* v. *A. V. Harperink* (2), the Court itself was bound to hold that the plaintiff had bought a rice mill and the land on which it stood. The fact that such land was not included in Holding No. 53 cannot oust the right of the plaintiff to obtain the rice mill and the land as well as Holding No. 53. The omission of mention of Holding No. 43 throughout Suit No. 43 of 1907 was a mistake or oversight, which cannot affect the real substance and subject of the litigation between the mortgagors and mortgagee: certainly not so when the auction-purchaser is claiming possession from the persons who could claim only through one or more of the mortgagors, and whose claim has been declared unfounded.

The third defendant is merely an officer of the Court appointed to take possession at the instance of a mortgagee whose mortgage, was created by one or more of the original defendants in Suit No. 43 of 1907. Questions may arise between this mortgagee the Bank of Bengal and the plaintiff as to whether it can enforce its mortgage over the land as against him, but it is not entitled to have a Receiver kept in possession in a suit to which the plaintiff is not a party. It may be noted that he was at one time made a party defendant in the Bank's Suit No. 51 of 1910, but his name was struck out of that suit by an order which appears in the diary under date the 28th September 1911.

I would allow the appeal, set aside the

(1) 27 B. 334; 5 Bom. L. R. 217.

(2) 1 Ind. Cas. 122; 5 L. B. R. 25; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 36 C. 323; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

decree of the District Court and make a decree ordering the defendants to deliver up to the plaintiff the rice mill, granaries and buildings on a piece of land now found to have been Holding No. 43 of 1904-05 in Thongwa Kwin Yne Circle, Thongwa Township, Hanthawaddy District, whatever its present holding number may be, and would order the 1st and 2nd defendants, Maung San Nyein and Maung Tun Win, to pay the plaintiff mesne profits in respect of such property from the 27th August 1909 up to the time when the third defendant obtained possession as Receiver of such property, and the third defendant to pay to the plaintiff mesne profits in respect of such property from the time he received possession of it until pessession is delivered to the plaintiff, and would direct the District Court to enquire into and determine the amount of such mesne profits.

I would order the first and second defendants to pay the plaintiff's costs of the suit and of this appeal.

PARLETT, J.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 24 OF 1914-15 OF FARRUKHABAD DISTRICT.

February 15, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

MUHAMMAD ABDUL HAFIZ KHAN—PLAINTIFF—APPELLANT

versus

RAM RATAN LAL—DEFENDANT—RESPONDENT.

Grove—Fruit orchard or timber grove—Tenant—Occupancy rights, acquisition of—Land—Agra Tenancy Act (II of 1901), *s.* 11.

Where a fruit orchard or timber grove has been planted, the grove-holder cannot be ejected as a tenant from year to year so long as the land maintains its character as a grove. Nor can he acquire occupancy rights so long as it remains a grove, because in either case, land is not land within the meaning of the Tenancy Act in which only occupancy rights can accrue. It becomes land after the disappearance of the grove. [p. 20 col. 2; p. 21 col. 1.]

Selected Decision No. 7 of 1911, Selected Decision No. 4 of 1911 and *Habibullah* v. *Kalyan Das*, 25 Ind. Cas. 169; 12 A. L. J. 1080 at p. 1081, considered and followed.

Selected Decision No. 1 of 1908, discussed and dissented from.

Second appeal from the order of the Commissioner of Allahabad Division, dated the 16th September 1914, reversing that of the Assistant Collector of Farrukhabad District in the case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*February 9th*, 1915.)—There is a finding of fact by the Commissioner that the land was first shown as cultivated in 1315 *Fasli* and in his judgment he says the facts are not disputed. Respondent wished to urge that the land became cultivated in 1306 *Fasli*. The *patwari* mentions the cultivation in that year, but does not say how much of the land was cultivated and the *khasra* has not been produced. I must accept the finding of fact by the Commissioner.

The case of a fruit orchard like the present must be distinguished clearly from that of a timber grove. By Selected Decision No. 7 of 1912 it is laid down that an important principle which applies to timber groves is applicable also to a fruit orchard. The principle is that, where a landlord allows a grove to be planted, he admits the tenant on a special agreement which prevents him ejecting the tenant as one holding from year to year. This is not, however, precisely the point in the present case. Under section 11, a tenant who has held the same land continuously for twelve years has a right of occupancy in that land. The Board have held in Selected Decision No. 1 of 1908 that the term 'land,' as used in the Tenancy Act, includes an area occupied by grove land, whether a timber grove or a fruit orchard, that is to say, that a fruit orchard comes within the definition of land held for agricultural purposes. In Selected Decision 4 of 1911 both members dissented from this decision as regards timber groves and one member (Mr. Reynolds) seems to have dissented from it as regards fruit orchards in cases where the land was for the purpose of planting an orchard in it.

The High Court in *Habibullah* v. *Kalyan Das* (1) has held that land which was given for the purpose of growing both timber and fruit trees was not land held for agricultural purposes within the meaning of the Tenancy Act.

(1) 25 Ind. Cas. 169; 12 A. L. J. 1080 at p. 1081.

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MA NYEIN HLA *v.* MAUNG GYI.

The High Court mentioned in their judgment Selected Decision No. 4 of 1911. It has been held definitely that a timber grove-holder cannot acquire rights of occupancy in the land on which the grove exists so long as it maintained the character of a grove, but there has been no similar finding in the case of a holder of a fruit orchard. When under the implied special agreement, the land-holder, is prevented from ejecting the tenant so long as the grove exists, it would be harsh on the landlord that the tenant should be allowed to acquire occupancy rights. In this view, I should be inclined to treat a fruit orchard such as that in suit, for planting which the land was originally given and a timber grove similarly for purposes of acquisition of occupancy rights, seeing that the principle of a special agreement has been extended to the former by Selected Decision No. 7 of 1912.

It seems clear that the land no longer maintains the character of a fruit orchard.

I would set aside the order of the Commissioner and restore that of the Assistant Collector, respondent paying costs throughout.

CAMPBELL, J. M.—I agree.

Appeal allowed,

LOWER BURMA CHIEF COURT.

CIVIL REVISION PETITION NO. 191 OF 1914.

April 29, 1915.

Present:—Sir Charles Fox., KT. Chief Judge.

MA NYEIN HLA—APPLICANT

versus

MAUNG GYI—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 63, 73—Execution proceedings—Decree-holders of different Courts attaching in execution same property, right of, to rateable distribution—Court of highest grade—Transfer of decree.

Under sections 63 and 73, Civil Procedure Code, all the holders of money-decrees who have attached the property of their judgment-debtor in execution in several Courts before the actual receipt of the assets by the Court of the highest grade, are entitled to share in the rateable distribution on application to such Court without getting their decrees transferred to it.

Sit Saing v. *Maung Po Kaing*, L. B. R. (1901) I p. 121, *Narasimhachariar* v. *Krishnamachariar*, 23 Ind. Cas. 909; 26 M. L. J. 406; 1. L. W. 403, referred to.

Mr. *Rahman*, for the Applicant.

Mr. *Sin Hla Aung*, for the Respondent.

JUDGMENT.—It appears to me that the Divisional Judge was correct in holding that section 63 of the Code was applicable to the case.

The property attached was money due by the Municipal Committee to the judgment-debtor. The decree-holder in the Sub-Divisional Court had it attached by prohibitory order on the 23rd May. The plaintiff in the District Court had previously had it attached before judgment, and on his obtaining a decree on the 20th June he asked for an order that the money be paid into Court. The money was not then in the custody of any Court, but was under attachment under the decree of two Courts. The money was paid into the District Court on the 25th June. The District Court under the circumstances was bound to give effect to both attachments. It could do so only by giving rateable distribution.

The case is distinguishable from *Sit Saing* v. *Maung Po Kaing* (1) in that no attachments by the inferior Courts had actually been made in that case, whereas in the present case attachment had actually been effected by the inferior Court before the superior Court received the money attached. In a case like the present the recent decision of the Madras High Court in *Narasimhachariar* v. *Krishnamachariar* (2) lucidly explains the duties of the superior Court.

It was urged at the hearing that no appeal lay to the Divisional Court. This is the case, but the ground was not taken in the application for revision, and as the Divisional Court's decision set right a decision of the District Court which was obviously unjust to the decree-holder in the Sub Divisional Court, I decline to exercise the revisional powers of the Court in the applicant's favour. If I did so, I should feel bound to revise the District Court's order and to pass the same order with respect to it as the Divisional Court did. The application is dismissed with costs.

Application dismissed.

(1) L. B. R. (1901) I, p. 121.

(2) 23 Ind. Cas. 909; 26 M. L. J. 406; 1 L, W. 403.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1911-12 OF SHAHJAHANPUR DISTRICT.

November 24, 1912.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

KEDAR NATH—APPELLANT

versus

HAR PRASAD—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—'Sharing in cultivation,' interpretation of—Member of joint family away from home, whether shares in cultivation.

Where a member of an agriculturist's family attempts to eke out the resources of the family by some extra work away from home which is not connected with agriculture, he does not cease to share in the cultivation within the meaning of the Tenancy Act.

Where cultivation is personal, the sharing must be personal; but where it is not personal, it need amount to no more than taking part in whatever arrangements are made by the tenant-in-chief.

Second appeal from an order of the Commissioner of the Rohilkhand Division, dated the 29th March 1912, reversing that of the Assistant Collector of Shahjahanpur District, in the case of determination of tenure.

JUDGMENT.

TWEEDY, J. M.—(*November 9th*, 1912).—The view taken by the Commissioner that where subtenants are cultivating no one can be said to share in the cultivation with the original tenant, cannot be upheld. Where the cultivation is personal the sharing must be personal, but where it is not personal it need amount to no more than that taking a part in whatever arrangements are made by the tenant-in-chief. I am not prepared to lay down that when a member of an agriculturist's family attempts to eke out the resources of the family by some extra work away from home which is not connected with agriculture, he ceases to "share in the cultivation" within the meaning of the Act. The appellant was born in the house and brought up by Laljit as his son and there is evidence that whenever at home on leave he helped in the arrangements made for the cultivation. He was beyond all controversy joint when he took up the appointment of schoolmaster and the mere fact of his leaving home and spending most of his time in his new employment would not necessarily separate him from his holding particularly when no personal cultivation is required.

The judgment of the Deputy Collector is a sound judgment and commends itself to me.

I would restore it and quash the finding of the Commissioner with costs.

BAILLIE, S. M.—Laljit at the time of his death did actually cultivate part of the holding and I agree that appellant enjoying jointly with him the profits of the holding and contributing to the common may be held to have shared in this cultivation and to be, therefore, qualified to succeed to the whole holding. I concur.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 141 OF 1912.

November 22, 1914.

Present:—Mr. Hayward, A. J. C.

HUSSEINI NANDOO—PLAINTIFF

versus

MESSRS. WEICHERS AND LEVY, LTD.—DEFENDANATS.

Civil Procedure Code (Act V of 1908), s. 83—Alien enemy, suit against—Property o such enemy, how far available in execution.

The plaintiff sued the defendants, a German Corporation, for an account. On the outbreak of hostilities between England and Germany in August 1914, the question arose whether the plaintiff could continue the suit during the war:

Held, that an alien being amenable to all local laws in consideration of the protection he enjoyed while residing in a foreign territory, there was no reason why he should not be sued or proceeded against in the Courts of India and that the decree against an alien enemy would be effective against his property subject to any rights of the Crown. [p. 22, col. 2; p. 23, col. 1.]

Mr. *Hirdaram Mewaram*, for the Plaintiff.

Mr. *Kalumal Pahloomal*, for the Defendant.

JUDGMENT.—An alien would appear to be amenable to all local laws in consideration of the protection he enjoys while residing in a foreign country according to the cases quoted in paragraph 672 of Volume I of Halsbury's Laws of England. This would appear to apply equally to an alien friend or an alien enemy. Reference should be made to the recent case of *Robinson Co.* v. *Continental Insurance Co.* decided in England and reported in the *Pioneer* of the 18 November 1914. There would appear,

therefore, to be no reason why an alien enemy should not be sued or proceeded against in the Courts of India, though he has been expressly precluded from suing by section 83, Civil Procedure Code, unless resident with the permission of the Governor-General in Council. Such permission would apparently have to be express and in absence of such permission, it would have to be considered how far an alien enemy's property would be available in execution without reference to the Executive Officers of the Crown in view of the authorities quoted in paragraph 685 of Volume I of Halsbury's Laws of England.

This suit, therefore, can proceed and it is unnecessary at this stage to determine whether or no an alien character has attached to the defendant Corporation by reason of the number of alien share-holders. The alien manager has, however, been interned in Ahmednagar and an adjournment till a day to be fixed in February will be given for the defence to be duly prepared on behalf of the Corporation by the present management under the British share-holders. The decree will be effective against the property of the Corporation subject to any rights of the Crown.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 22 OF 1911-12 OF JAUNPUR DISTRICT.

July 22, 1912.

Present:—Mr. Baillie, S. M.

PHEKU TEWARI—APPELLANT

versus

KALI DIN SINGH—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 28, scope of—Perpetual lease by widow having life-interest—Land-holder, right of.

A perpetual lease granted by a widow who has only a life-interest in the occupancy tenancy is not after her death binding upon the land-holder under section 28 of the Tenancy Act.

Section 28 of the Tenancy Act contemplates merely a lease for a fixed term and not a lease in perpetuity.

Second appeal from an order of the Commissioner of Benares Division, dated 18th January 1912, reversing that of the Assistant Collector of Jaunpur District in a case of ejectment.

JUDGMENT.—The question is as to the validity of a perpetual lease, granted by a woman as a widow who had a life-interest in an occupancy tenancy, after the death of lessor. The Commissioner has decided that the lease is not binding on the land-holder.

There appear to me to be two grounds for holding that section 28 does not apply :—(*i*) The lessor was not a full occupancy tenant having a right to transmit her rights to a successor. She had a life-interest only and lease executed by her would not have been binding on her sucessor if there had been any successor. It would be absurd to make a lease, which would not have been binding on the lessor's successors, to be binding on the landholder.

(*ii*) Section 28 appears distinctly to contemplate a lease of a term and not a lease in perpetuity. I do not consider that the lease now in question was binding on the landholder under section 28. It has been contended that as in addition to the signature of the life-tenant, two other persons alleged to be reversioners also signed it, the effect is the same as if it were given by a person having full occupancy rights. There is nothing to show that the persons who in addition to the widow signed the lease were entitled to the reversion of this occupancy right. I agree with the view taken by the Commissioner and dismiss the appeal with costs on appellants.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1170 OF 1913.

February 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

T. R. SUNDARAM AIYAR—PLAINTIFF—APPELLANT

versus

SUBBAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Absolute alienation of joint family property in lieu of maintenance, whether legal.

GOPHURAN *v.* KALLU.

An absolute alienation of joint family property to a maintenance-holder in lieu of maintenance is not necessarily illegal.

Second appeal against the decree of the District Court of Tinnevelly, in Appeal Suit No. 265 of 1912, preferred against that of the District Munsif of Ambasamudram, in Original Suit No. 50 of 1911.

Mr. *C. V. Anantha Krishna Aiyar*, for the Appellant.

Mr. *A. Swaminatha Aiyar*, for the Respondent.

JUDGMENT.—No authority has been adduced to support the appellant's contention that any absolute alienation of joint family property to a maintainance-holder in lieu of maintainance is necessarily illegal: and in the present case we must accept the finding of the lower Appellate Court that the alienation by Exhibit I was not excessive or unreasonable in the circumstances in which it was made.

The second appeal is dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 35 OF 1902-03 OF MEERUT DISTRICT.

July 1, 1903.

Present:—Mr. Hardy, S. M., and Mr. Thomson, J. M.

Musammat GOPHURAN—PLAINTIFF—APPLLICANT

versus

KALLU AND OTHERS—DEFENDANTS—RESPONDENTS.

Ejectment suit—Cause of action, when arises—Suit withdrawn without permission to bring fresh suit—Fresh suit based on another cause of action, if barred—Civil Procedure Code (Act XIV of 1882), s. 373.

A fresh cause of action arises each year as regards ejectment and, therefore, a suit for ejectment withdrawn without permission to bring a fresh suit does not bar another suit of ejectment based on another cause of action.

Application for revision of an order passed by the Additional Commissioner of Meerut Division, dated 7th February 1903, confirming that of the Assistant Collector, first Class of Meerut District, in a case of ejectment.

JUDGMENT.

THOMSON, J. M.—The plaintiff brought a suit under section 58/63 (*a*), Act II of 1901, on 27th March 1902, for ejectment of the defendants, but on 15th May applied to have it dismissed, and it was struck off accordingly. On 16th May plaintiff applied for permission under section 373, Civil Procedure Code, to file a fresh suit. This application was granted.

On 9th July 1902 the plaintiff brought the present two suits in respect of the same land under the same sections. The lower Courts have held that they are not maintainable, the permission granted under section 373 being *ultra vires* and the Court which dismissed the first suit on 15th May being *functus officio* on the 16th May. A reference to section 63, Act II of 1901, shows that the first suit was brought under the special provisions of clause (2) of that section with a view to ejectment from 1st July of that year *i. e.*, from the beginning of 1310 *Fasli*.

The second suits were for ejectment from the 1st July 1903, *i. e.*, 1311 *Fasli* and were brought under the first clause of section 63.

The lower Courts were, in my opinion, right in their view of the law as regards the first suit which, inasmuch as no permission under section 373, Civil Procedure Code, had been granted before it was struck off, could not be instituted again. But a fresh cause of action arises each year as regards ejectment and I hold that so far as the second suits were concerned, no permission was necessary.

The Commissioner was, in my opinion, wrong in holding that the second suits did not lie and as he disposed of the appeal before him on this point only and failed to dispose of the other pleas before him, I would remand the appeal to him for disposal on the other points.

HARDY, S. M.—I concur. The Commissioner's order should be set aside and the case remanded.

Application allowed; Cause remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 12 OF 1912.

October 23, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

Musammat LADHIBAI—PLAINTIFF—APPELLANT

versus

ISARMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Res judicata—*Hindu widow, suit by, for maintenance—Subsequent suit by her for residence in family house, whether barred—Evidence Act (I of 1872), s.* 115—*Estoppel—Subsequent contention negativing a prior one—Estoppel.*

The plaintiff, a Hindu widow, lived outside her husband's house in his life-time and received a maintenance allowance awarded to her under section 488, Criminal Procedure Code. Her husband died in 1897 and in 1898 she took up her residence in one of his houses which was not a family residence. She continued receiving her maintenance allowance from the defendants (heirs of her husband) which was subsequently stopped. In 1908 she filed a suit for maintenance and obtained a decree against the defendants. The defendants filed another suit in 1908 against her for ejectment and obtained a decree, which was confirmed on appeal, ejecting her from the house occupied by her on the ground that she had a right of residence in the family house, but not the house in that suit. Thereupon she brought the present suit to establish her right of residence in the family house which the defendants contended was barred by reason of her prior suit for maintenance wherein no relief for residence had been sought:

Held, that the suit was not barred by her prior suit for maintenance as that maintenance allowance was fixed at a time when she had a residence in one of the defendants' houses and that her subsequent ejectment therefrom gave her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house; [p. 26, col. 1.]

that the defendants having ejected plaintiff from the house she was occupying on the ground that it was not the family residence, were now estopped from denying her right to a residence in the family house. [p. 26, col. 1.]

Varajlal Solot v. *Bhaiji Nagardas*, 6 Bom. L. R. 1103, followed.

Appeal against the judgment and decree of the Joint Judge, Sukkur-Larkana.

Mr. *Nihalchand Tikamdas*, for the Appellant.

Mr. *Fatehchand Asudomal*, for Respondents Nos. 1 and 3.

JUDGMENT.—The plaintiff who is a widow of Hemandas sues the defendants, who are a co-widow and other heirs, for a declaration of her right to reside in the family house of Hemandas and for a consequential injunction.

The facts that led up to the suit are admitted.

The plaintiff either left or was turned out of Hemandas' house in Hemandas' life-time and received a maintenance allowance awarded to her under section 488 of the Criminal Procedure Code. Hemandas died in the plague of 1897 and the plaintiff in 1898 took up her residence in a house of Hemandas which was not the family residence. The *nazir* was appointed guardian of the property of the minor heirs of Hemandas and he did not interfere with her occupation and continued the maintenance allowance that had been ordered under section 488. On the heirs succeeding to the management of the estate they discontinued the maintenance allowance and suits ensued.

Plaintiff filed Suit No. 206 of 1908 for maintenance and obtained a decree on the 31st May 1909. The defendants then filed Suit No. 244 of 1908 to eject her from the house she was occupying, on the grounds that she was unchaste and that the house was not the family residence. That suit was decided on the 1st January 1909 prior to the decree in the maintenance suit. But at the time of that decree the ejectment suit was under appeal and in appeal it was decided on the ground that she had a right of residence in the family house, but not in the house in suit.

The plaintiff then brought the present suit to establish her right of residence in the family house.

The suit was decreed by the first Court, but the decree was reversed in appeal by the lower Appellate Court.

The lower Appellate Court proceeds on two grounds, (1) that the plaintiff is not entitled to both maintenance and residence and (2) that she lost her right of residence by living separate from her husband. We do not think the decision can be supported on either of these grounds. The proposition that a widow who receives a separate maintenance cannot claim residence in the family house is perfectly reasonable on the assumption that her separate maintenance has been assessed with a view to separate residence, further the amount of maintenance so fixed would cover her expenses for rent.

The widow has a right to adequate maintenance and there is no obligation on her to reside in the family house. Where she elects to live apart, the maintenance would include a provision for her rent or residence and this is only subject to the direction of the Court which might, where the family property is small, refuse to a widow living apart a greater allowance than her maintenance would have cost had she remained in the family house. *Kasturbai* v. *Shivajiram Devkurna* (1). The second ground is directly opposed to the law as laid down by the Madras High Court in *Surampalli Bangaramma* v. *Surampalli Brambaze* (2), a decision in which we fully concur.

Now it is admitted that at the time the maintenance decree was made the plaintiff was in occupation of one of Hemandas' houses and the lower Appellate Court finds that a provision for her residence was not considered when fixing the amount of maintenance. It is said that the decree in the maintenance suit bars the present claim. But as laid down in the case of *Bangaru Ammal* v. *Vijayamachi Reddier* (3), a maintenance decree is not final in respect of the amount of maintenance fixed, a suit will always lie for its reduction or increase. Plaintiff's maintenance allowance was fixed at a time when she had a residence in one of the defendants' houses. She has been ejected from that residence and that gives her a cause of action to demand that the maintenance should be supplemented by provision for her residence in the family house. This cause of action arose on her ejectment subsequent to 1909 and the suit is, therefore, in time. We should also add that the defendants having ejected plaintiff from the house she was occupying on the ground that it was not the family residence, are now estopped from denying her right to a residence in the family house. As said in *Varajlal Solot* v. *Bhaiji Nagardas* (4), "it is a sound principle of law that as between the same litigants a defendant cannot defeat the claim of the plaintiff by a plea negativing a contention successfully advanced by him in a former suit if he thereby approbates and reprobates."

(1) 3 B. 372.
(2) 31 M. 338; 18 M. L. J. 254; 3 M. L. T. 266.
(3) 22 M. 175.
(4) 6 Bom. L. R. 1103.

It is not contended that the estate is too small to bear the charge of maintenance and residence.

Before making a final decree, however, we wish to give the parties an opportunity of making provision for the right of residence in some other way. We adjourn the appeal for this purpose till to-day fortnight.

The parties have agreed that plaintiff should receive Rs. 5 a month increased maintenance in lieu of residence in the family house. We reverse the decree of the lower Court and pass a decree for the plaintiff for Rs. 5 a month increased maintenance with arrears from date of suit. Costs in all Courts on the defendants.

Decree reversed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 56 OF 1914.

February 24, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

KATTAMPUDI SUBBIAH CHETTY—DEFENDANT—PETITIONER—APPELLANT

versus

Khan Bahadur WALJI LALJI SAIT—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. V, r. 20—Service of summons upon defendant—Affixing of summons to outer door of house, when sufficient—Inquiry as to suit by third party, whether notice to party inferred.

Notice of suit cannot be fixed to a party to a suit by officious inquiries made by parties unconnected with it about its result. Service of the summons by affixture to the outer door of the house of the defendant is good only when the plaintiff, on being told that the defendant has gone to a different place, makes an attempt to serve him in that place by taking out fresh summons against him to that place also. [p. 27, col. 1.]

Appeal against the order of the Court of the Temporary Subordinate Judge of Nellore, dated the 1st November 1913, in Miscellaneous Petition No. 106 of 1913, in Original Suit No. 36 of 1913, (Original Suit No. 30 of 1913, on the file of the District Court of Nellore).

Mr. *S. Subramania Aiyar*, for the Appellant.

Mr. *K Narain Rao*, for the Respondent.

JUDGMENT.—We think that the mere fact that some person, who had no authority to represent a party to a certain suit, makes inquiries as to what had been done with that suit, is not a legal ground for declaring that that party was duly served with notice of the suit.

We also think that the return on the first summons in the case being that the defendant had gone to Gudur, the Subordinate Judge should have directed the plaintiff to take out fresh summons to Gudur, and in the absence of any attempt to effect service at Gudur, the service by affixture at Santhapeta should not have been treated as sufficient service.

We set aside the *ex parte* decree and direct the District Judge to take the case on his file and dispose of it according to law.

Costs will be costs in the cause.

Appeal allowed; Suit remanded.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 83 OF 1913.

February 22, 1915.

Present: —Sir Charles Fox, KT., Chief Justice, and Mr. Justice Hartnoll.

S. M. A. CHETTY FIRM—PLAINTIFF—APPELLANT

versus

M. L. R. M. A. CHETTY FIRM AND OTHERS—DEFENDANTS—RESPONDENTS.

Acknowledgment of debt—Partnership firm—Receiver, acknowledgment by, how far affords starting date for fresh period of limitation—Limitation Act (IX of 1908), s. 19.

The acknowlodgment of a debt of a partnership firm by its Receiver, appointed for collecting its outstandings and doing all things necessary for the realisation and preservation of its assets, does not afford a fresh start for limitation, as it does not come within the power to collect outstandings or to realize assets; it may have been otherwise if the powers of managing the partnership business had been conferred on the Receiver. [p. 28, col. 2.]

Payment of interest and giving of acknowledgment of a debt are two different things. [p. 28, col. 2.]

Lewin v. *Wilson*, (1866) 11 App. Cas. 639; 55 L. J. P. C. 75; 65 L. T. 410; *Ebrahim Haji Yakub* v. *Chunilal Lalchand Kabree*, 10 Ind. Cas. 888; 35 B. 303; 13 Bom. L. R. 284; *Chinnery* v. *Evans*, (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 145 R. R. 79, referred to.

Mr. *Coltman*, for the Appellant.

Mr. *B. Lentaigne*, for the Respondent.

JUDGMENT.

FOX, C. J.—The question for determination on this appeal is whether an acknowledgment given by a Receiver of a partnership property appointed in a suit to dissolve and wind-up the partnership afforded a creditor of the partnership a starting date for a fresh period of limitation under section 19 of the Indian Limitation Act, 1908.

The suit in which the Receiver was appointed was brought by the 2nd respondent in this appeal by his next friend, the 1st respondent. It is Civil Regular Suit No. 38 of 1910 of this Court. The order of appointment runs as follows:—

"It is ordered that M. A. R. A. R. Ramanathan Chetty be and he is hereby appointed Receiver on a monthly remuneration of Rs. 300 (three hundred) only to take charge of the property of the Chetty firms of M. L. R. M. A. and A. L. A. S. R. M. pending the decision of the suit for dissolution of partnership with power to collect outstandings and do all things necessary for the realization and preservation of the assets of the said firms."

The debt sued on in the present suit was contracted by the M. L. R. M. A. firm on the 30th January 1908, and the suit was instituted on the 15th May 1912. *Prima facie* it was barred by limitation. The plaintiff firm, however, relied on an entry in a book the translation of which is given as affording them a fresh period of limitation: "17th day of *Kartigai* month *Satharana* year (corresponding with the 2nd December 1910) credit to S. M. A. firm and debit to M. L. R. M. A. firm by transfer from previous account at the two months' term, loan rate of interest, Rs. 5,917-7-9 for which sum of Rupees five thousand nine hundred and seventeen, annas seven, pies nine (I sign)

M. L. R. M. A.'s Receiver,

M. A. R. A. R. Ramanathan Chetty."

The plaintiff's agent and attorney said in evidence that in December 1910 he pressed the M. L. R. M. A. firm for payment. This pressure was apparently put on Soliappa Chetty, one of the defendants who had been managing partner of the firm in Rangoon. The plaintiff's agent asked him to give an

acknowledgment of the debt, but Soliappa refused to do so because a Receiver had been appointed, and the Receiver would give one as he had given in others cases.

Both went to the Receiver, who said he had no money in hand but he would renew the loan. He then give the acknowledgment in Soliappa's presence, the latter agreeing to this course being adopted. For the plaintiff, it is contended that in signing the acknowledgment the Receiver did so as a duly authorized agent of all the partners of the M. L. R. M. A. firm in virtue of his position as Receiver of its assets, or at any rate as authorized by its managing partner Soliappa, and that in view of how it came to be given the patners of the M. L. R. M. A. firm are, or Soliappa is, estopped from repudiating the acknowledgment.

I agree with the learned Judge that no question of estoppel arises in the case. The plaintiff's agent was not dealing direct with partners of the firm. It lay upon him to ascertain the extent of the authority of the person he dealt with to bind the partners in the firm. Soliappa was no longer the managing partner, and had refused to himself give any acknowledgment. This should have conveyed to the plaintiff's agent that Soliappa did not profess to have any authority at the time to bind his fellow-partners. Upon the question whether the Receiver was as such an agent of the partners duly authorized to sign an acknowledgment of a debt due by them, *Chinnery* v. *Evans* (1) has been relied on. It was a case in which a Receiver of mortgaged property had been appointed under an Irish Act, and the question was whether payments of interest he had made kept alive the mortgage over several properties although in fact he had been in possession of only one of them. It was held that in making the payments he acted as agent of the mortgagor, and the mortgage-debt over all the estates was not barred by limitation. From the report of the arguments at page 129 of the report it would appear that the wording of the Statute under which the Receiver was appointed treated a Receiver under it as the agent of all the parties concerned. The decision underwent some examination and criticism in *Lewin* v. *Wilson* (2) in the Privy Council. It was pointed out that payment of interest and giving an acknowledgment of a debt are two different things. The case we have to deal with is a case of a Receiver of partnership assets in a suit for dissolving and winding-up the partnership, who was appointed under Order XL of the Code of Civil Procedure. Under that Order powers of managing the partnership business might have been conferred on the Receiver, but this was not done. His powers were limited to collecting outstandings and doing all things necessary for the realization and preservation of the assets. The giving of an acknowledgment of a sum being due by the partnership clearly did not come within the power to collect outstandings or that to realize assets. It is argued, however, that it came within the power to do all things necessary to preserve the assets. *Ebrahim Haji Yakub* v. *Chunilal Lalchand Kabree* (3) is relied on in support of this contention. That was a case in which an acknowledgment of liability of his principal had been given by the manager of a business after the owner's death. It was held that under the circumstances of the case the letter containing the acknowledgment was a reasonable one for the manager to write to a creditor and that his writing was authorised under sections 208 and 209 of the Indian Contract Act as being an act which an agent could reasonably do for the protection and preservation of his principal's property after his death.

It is unnecessary to express either assent to or dissent from the decision. The case we have to deal with is not that of a managing agent but one of a Receiver upon whom no power of managing and carrying on the business had been conferred by the Court which appointed him. Under the power of doing all things necessary to preserve the assets, the Court could not have contemplated that the Receiver should either pay away any of the moneys he collected or give acknowledgments of amounts being due, or do any other acts of carrying on the business as a going concern withont its further orders.

(1) (1864) 11 H. L. C. 115; 4 N. R. 520; 10 Jur. (N. S.) 855; 11 L. T. 68; 13 W. R. 20; 11 E. R. 1274; 145 R. R. 79.

(2) (1866) 11 App. Cas. 639; 55 L. J. P. C. 75; 55 L. T. 410.

(3) 10 Ind. Cas. 888; 35 B. 303; 13 Bom. L. R. 264.

In re TANGUTURU SRIRAMULU.

No case has been cited to us of a Receiver of a partnership business being held to be the agent of all or any of the partners, and the order of appointment of the Receiver who gave the acknowledgment did not, in my opinion, authorize him to give the acknowledgment. Consequently the acknowledgment did not afford a fresh start for limitation and the suit was barred.

I would dismiss the appeal with costs against the defendant who has appeared on the appeal.

HARTNOLL, J.—I concur.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 521 OF 1915.

February 16, 1915.

Present:—Sir John Edward Power Wallis, KT., Chief Justice, and Mr. Justice Trotter.

In re TANGUTURU SRIRAMULU—PLAINTIFF—PETITIONER.

Transfer of a civil case Judge's expression of opinion about plaintiff's paper, when not ground for transfer—Conduct of plaintiff.

An expression of opinion by a Judge as to the character of the plaintiff or of his paper, is no ground for transfer when that expression of opinion was elicited by the conduct of the plaintiff himself.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the transfer of Original Suit No. 48 of 1913 from the file of the District Court of Godaveri to that of any other District Court.

FACTS.—Mr. Sriramulu, Editor of the *Carlylean*, and a first Grade Pleader practising in the District Court of Godaveri, instituted a suit against Rao Bahadur K. Veeresalingam Panthulu for damages for libel alleged to have been published by the defendant in a pamphlet which was circulated to the public. In the course of the trial before the District Judge, Mr. Cotton, the plaintiff applied for an adjournment of the case stating that certain papers relevent to the case had been filed in a criminal case then pending, and that they could not be yet procured. The Judge refused the adjournment asked for, and asked the plaintiff to enter into the witness-box to prove the allegations in his plaint. The plaintiff in reply stated that he had other evidence to adduce, which he would do first before himself going into the witness-box. The Judge insisted on his going into the box and asked the *duffadar* of the Court to put him into the witness-box, and in the course of the examination of the plaintiff, the Judge was alleged to have stated, referring to an article in his paper, the *Carlylean*, that the Judge used to sleep on the Bench, that Mr. Elwin, the Collector and District, Magistrate, Mr. Stewart the Sub-Divisional Magistrate, and himself had formed a bad opinion of him and his paper. The plaintiff, thereupon, requested the Judge to adjourn the case, on the ground that, in view of the remarks that had fallen from the Bench, he wanted to apply to the High Court for a transfer of the case, as he apprehended that he was not going to have a fair and impartial hearing. The adjournment asked for was granted and the plaintiff applied to the High Court.

Messrs. *P. Chenchiah* and *J. L. Rosario*, for the Appellant.

JUDGMENT.—There is, we think, nothing in the allegation in paragraphs 7 and 8 of the affidavit. The plaintiff in the course of the case appears to have been vaunting the merits of his paper and the District Judge in answer observed that he did not make much of it or him. Mr. Cotton in the observations he has forwarded us very frankly admits that the observation, which was to some extent elicited by the observations of the plaintiff himself, who as a litigant in person no doubt assumed considerable latitude, was injudicious and it was no doubt thoughtlessly made, but we do not think it and the other allegations afford any serious ground for supposing that the plaintiff will not have a fair trial or for inducing him to think so.

The application is dismissed.

Application dismissed.

JETHALAL KALIANJI *v.* GANGARAM NAOOMAL.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 43 OF 1914.

November 16, 1914.

Present:—Mr. Hayward, A. J. C.

JETHALAL KALIANJI—PLAINTIFF

versus

GANGARAM NAOOMAL AND OTHERS—DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXII, r. 10—Insolvency of defendants in a money suit—Official Receiver, whether necessary or proper party to such suit—Provincial Insolvency Act (III of 1907), s. 16, cl. (2) (b)—Suit instituted before pendency of insolvency proceedings—Decree, how far binding on Official Receiver.

The plaintiff sued for recovery of money and after the institution of the suit, the defendants applied to be adjudicated insolvents and were so adjudicated under the Provincial Insolvency Act (III of 1907). The defendants contended that the Official Receiver ought to be made a party to the suit and in any event, the decree ought not to be made binding on the Official Receiver:

Held, (1) that the insolvency of defendants in a mere money suit did not effect the devolution of any interest upon the Official Receiver within the meaning of Order XXII, rule 10, of the Civil Procedure Code; [p 30, col. 1.]

Miller v. *Budh Singh*, 18 C. 43, followed.

(2) that as no interference in pending proceedings was contemplated by section 16 of the Provincial Insolvency Act (III of 1907), it was not necessary nor even proper to join in a suit of that nature the Official Receiver, but at the same time the decree could not be executed against the estate of the insolvents, nor be binding on the Official Receiver. [p. 31, col. 1.]

Wray, In re, (1887) 36 Ch. D. 138 at p. 143; 56 L. J. Ch. 1106; 57 L. T. 605; 36 W. R. 67, *Berry, In re, Duffield* v. *Williams*, (1895) 1 Ch. D. 939 at p. 946; 65 L. J. Ch. 245; 74 L. T. 306; 44 W. R. 346; 3 Manson 11, referred to.

Mr. *Assanmal Bulchand*, for the Plaintiff.

Mr. *Isardas Oodharam*, for Defendant No. 2.

JUDGMENT.—The plaintiff sues the defendants for damages in respect of a breach of contract of sale of land. The defendants have admitted the contract but dispute the damages. The plaintiff agreed to purchase the land for Rs. 18,150 on the 4th of October 1913. Rupees 1,000 were paid as earnest money and the balance was to be paid on completion of the sale within two months. The plaintiff called upon the defendants to complete the sale by messages through the broker and also by notices. But the defendants failed to complete it. The plaintiff received an offer for the property of Rs. 22,000 on the 13th of December 1913, but was unable to accept the offer owing to the failure of the defendants to complete the transfer of the land. The offer would appear to have been a *bona fide* offer made by a Bori Alibhoy through the broker Deo Chand. The plaintiff would, therefore, appear to be entitled to recover from the defendant the earnest money, Rs. 1,000, and also Rs. 3,850, being the difference between the contract price Rs. 18,150 and the offer of Rs. 22,000, which must be taken as market value of the land about the time of the defendants' breach of their agreement to sell. There must, therefore, be a decree for Rs. 4,850 against the defendants with costs.

The defendants, however, have been adjudicated insolvents since the filing of the suit. The defendant No. 1 has not appeared, but Mr. Isardas has asked on behalf of defendant No. 2 who has not appeared that the Official Receiver ought to be made a party and that in any event the decree ought not to be made binding on the Official Receiver. The only rule of procedure under which it would be possible to make him a party would appear to be rule 10 of Order XXII. But it was held, and apparently rightly held, in the case of *Miller* v. *Budh Singh* (1) that the insolvency of defendants in a mere money suit did not effect the devolution of any interest upon the Official Assignee within the meaning of section 372 of the Civil Procedure Code, which is now substantially rule 10 of Order XXII. The only other rule necessary to consider is that prescribed in section 16 of the Provincial Insolvency Act of 1907. The words of that provision again do not appear strictly to cover the case. The words are: "No creditor....shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding." Those words were taken from section 9 of the English Bankruptcy Act, 1883, and were held to have no reference to proceedings actually pending by North, J., in the case of *Wray, In re* (2). That decision was approved by Stirling, J., in the case of

(1) 18 C. 43

(2) (1887) 36 Ch. D. 138 at p. 143; 56 L.J. Ch 1106; 57 L. T. 605; 36 W. R. 67.

Berry, In re, Duffield v. *Williams* (3). No doubt there is a provision providing for staying of pending actions in section 10 of the English Bankruptcy Act, 1883. That, however, has not been incorporated in section 16 of the Provincial Insolvency Act, 1907, that section must be interpreted as it stands and it would, accordingly, appear that no interference in pending proceedings was contemplated by section 16 of the Provincial Insolvency Act, 1907. It follows that it would not be necessary, nor even proper, to join in a suit of this nature the Official Receiver. At the same time the decree cannot be executed against the estate of the insolvents nor be binding on the Official Receiver, and it would be open to him, if so advised, to decline to accept the decree as proof of a claim against the estate of the insolvents and to insist on such other proof as might appear necessary, should the decree be offered as proof of a debt provable under section 28 of the Provincial Insolvency Act of 1907.

Suit decreed.

(3) (1895) 1 Ch. D. 939 at p. 946; 65 L. J. Ch. 245; 74 L. T. 306; 44 W. R. 346; 3 Manson 11.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 506 TO 510 OF 1912.

January 25, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

IN NOS. 506 AND 508 OF 1912

SONA ALAGA KUDUMBAN—DEFENDANT—APPELLANT

IN NO. 507 OF 1912

KARUPPAI KONE—DEFENDANT—APPELLANT

IN NO. 509 OF 1912

CHITRA AND ANOTHER—DEFENDANTS—APPELLANTS

IN NO. 510 OF 1912

MANGAIKKARASU PILLAI—DEFENDANT—APPELLANT

versus

N. S. SIVARAMA AIYAR—PLANTIFF—RESPONDENT (IN ALL).

Madras Estates Land Act (*I of* 1908), *ss.* 3 *(5)*, 77 194—*Suit for rent—Tenant disputing title of plaintiff as land-holder—Court, duty of, in such cases—Court, when to decide the question by itself.*

Where a *ryot* disputes the title of the plaintiff to collect rent, no decree can be passed for the rent until that question has been decided in favour of the plaintiff. [p. 32, col. 2.]

Where, in a suit under section 77 of the Madras Estates Land Act for recovery of rent, the tenant disputes the title of the plaintiff as a land-holder and sets up the title of a third person, there are three courses open to a Court, *viz.*, the Court may, by itself, determine who the land-holder is who should collect rent, or it may direct the plaintiff to apply to the Collector to declare him to be the land-holder or may apply section 194 of the Madras Estates Land Act and if it finds there has been no *bona fide* payment of rent to a third person, it may give the tenant the option of paying the same into Court. Where the parties themselves are before the Court, the proper course is for the Court before which the suit is filed to make the inquiry itself. [p. 32, col. 2.]

Second appeals against the decrees of the District Court of Ramnad, in Appeal Suits Nos. 373, 370, 372, 371 and 369 of 1911 respectively, preferred against those of the Special Collector of Ramnad, in Summary Suits Nos. 2149, 2146, 2148, 2147 and 2145 of 1910 respectively.

Mr. *V. Viswanatha Sastri*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishanaswamny Aiyar* and *E. S. Chidambaram Pillai*, for the Respondents.

These second appeals coming on for hearing on the 16th January 1914 and having stood over for consideration till 10th Feruary 1914, the Court (the Hon'ble Sir Charles Arnold White, KT., Chief Justice, and the Hon'ble Mr. Justice Tyabji) delivered the following

JUDGMENT.

IN SECOND APPEAL NO. 506 OF 1912.

This appeal arises out of a suit under section 77 of the Madras Estates Land Act, which was instituted before the Special Deputy Collector of Ramnad for rent for *Faslis* 1318 and 1319. The plaintiff claims to be the sub-lessee of the village of Peerkangurichi and alleges that the defendant is a *ryot* occupying lands in the said village. The defence is not quite easy to understand from the written statement and the learned Pleader who appeared for the defendants had some difficulty in interpreting it.

The issues raise the question whether the lands are *inam* lands and whether the Court

has jurisdiction to entertain the suit. The real question between the parties seems to be whether the right to receive the *melvaram* is now vested in the plaintiff or whether it has been acquired by a third party through whom the defendants claim to hold the lands, and the argument before us proceeded on the basis that what had to be decided was whether the plaintiff is the land-holder within the meaning of section 3 (5) of the Madras Estates Land Act and whether the Revenue Courts have any jurisdiction to try a suit in which it is disputed that the plaintiff is the land-holder.

The suit being under section 77 of the Madras Estates Land Act, it can lie before the Revenue Courts only if the plaintiff establishes that he is the land-holder within the definition of that term in section 3 (5). The second sentence of that sub-section is in the following terms: "Where there is a dispute between two or more persons as to which of them is the land-holder for all or any of the purposes of this Act or between two or more joint land-holders as to which of them is entitled to proceed and be dealt with as such land-holder, the person who shall be deemed to be the land-holder for such purposes shall be the person whom the Collector, subject to any decree or order of a competent Civil Court, may recognise or nominate as such land-holder in accordance with rules to be framed by the Local Government in this behalf." It was argued in the first instance that the dispute referred to in this sentence must be between two or more persons who are parties to the suit. But there is nothing to warrant such a construction of the clause. On the other hand, it is admitted that in the present case there is no person that the Collector has recognised or nominated as such land-holder in accordance with rules framed by the Local Government in this behalf. The Act is silent on the question as to what is to be done in such a case, though it provides for the converse case, namely, where the Collector has already recognised or nominated a land-holder. There is no express provision to the effect that no suit shall proceed under the Act unless the person whose title to be a land-holder is questioned, has been recognised or nominated as land-holder by the Collector in accordance with sub-section 5 of section 3 of the Act. It would, therefore, seem that the suit could not have been rejected by the Deputy Collector on that ground.

The next question is in what manner the Act requires it to be determined whether or not the plaintiff is a 'land-holder' in a case where no person has been recognised or nominated as such under section 3 (5). Reference was made to section 194 of the Act. But that section cannot in terms apply to the present suit, as here the *ryots* do not admit that rent is due from them. In such circumstances it is difficult to apply section 194 and to require the *ryots* to pay into Court the amount claimed by the plaintiff.

It is, by no means, easy to determine what is the procedure laid down by the Act under such circumstances. But it is clear that where the *ryot* disputes the title of the plaintiff to collect rent, no decree can be passed for the rent until that question has been decided in favour of the plaintiff. How is that question to be decided in cases that are not covered either by section 194 or by section 3, sub-section 5?

Where in a suit for rent the plaintiff has not been recognised or nominated as land-holder under section 3 (5), and his title to be deemed the land-holder is disputed by the defendants, then it would seem that the Court has various alternatives open, and that it may choose that one which may seem to be the most suitable to the particular circumstances. *First*, it may itself determine the question in the course of the suit as to whether or not the plaintiff is the land-holder. *Secondly*, it may require the plaintiff to apply to the Collector under section 3 (5) for being recognised or nominated as the land-holder. *Thirdly*, it may apply, as nearly as possible, the provisions of section 194 and for that purpose determine, in the first instance, whether as a matter of fact rent had been paid by the *ryots* to the third person alleged by them to be the land-holder, and if it is found that the rent has not been paid, may give them the option of paying the rent into Court so that they may not have to risk the liability to pay it over a second time nor be unnecessarily brought in as parties to a dispute between two rival claimants to be deemed land-holders. In any event the Court would have to exercise its discretion as to which of these alternatives should be

chosen in any particular case; and in doing so it would take a course which would on the one hand discourage frivolous denials of title on the part of the tenants who wish to avoid paying any rent, and on the other, prevent real disputes as to the title to land being brought up for decision in a suit for rent under section 77. In the present case we think the most suitable course would be that the question should be decided in the suit itself, in accordance with the first alternative to which we have referred.

There is no doubt a finding of the lower Appellate Court that the plaintiff is the land-holder, but we cannot accept that finding. The learned District Judge seems to have omitted to notice that the plaintiff might have lost his right to the *melvaram* in the lands in question by limitation and that some third person might have acquired it by adverse possession. The suit will, therefore, be remanded to the lower Appellate Court for recording findings on the following issues:—

(1) Whether the plaintiff is the land-holder of the lands referred to in the plaint;

(2) whether the plaintiff is entitled to any, and if so what, rent from the defendants.

The parties will be at liberty to adduce fresh evidence if they desire to do so. The findings will be submitted within six weeks and seven days will be allowed for filing objections.

The Second Appeals Nos. 507 to 510 of 1912 will follow this judgment.

In compliance with the above Order of this Court, the District Judge of Ramnad submitted the following

FINDINGS: * * * *

1. *Finding on issue* 1. In the result I find this issue against plaintiff.

2. *Finding on issue* 2. Plaintiff is not, therefore, entitled to any rent for suit lands. If, however, he is held to be the land-holder, he will be entitled to rent as sued for; the rent claimed in each suit being on the basis of the Baki Jabitas, Exhibits L, series and defendants having no evidence *contra*.

These second appeals coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the findings, set aside the decrees of the lower Appellate Court and restore those of the Special Deputy Collector. Appellants will get their costs from the respondents in this and the lower Appellate Court.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE REFERENCE No. 21 OF 1914 OF ALIGARH DISTRICT.

May 6, 1914.

Present:—Sir Duncan Colvin Baillie, S. M., and Mr. Tweedy, J. M.

RAFIULLAH—APPLICANT

versus

AHMAD SALEH—RESPONDENT.

U. P. Land Revenue Act (III of 1901), *s.* 185—*Revision, power of—Suit for profits—Claim admitted—Plaintiff absent—Suit dismissed—Order, legality of.*

Where in a suit for profits the plaintiff was absent on the date of hearing and the defendant who was present, admitted part of the claim but the Court dismissed the suit *in toto*:

Held, that the order was glaringly illegal and that the Board had jurisdiction under section 185 of the Land Revenue Act to set aside the order.

Reference made by the Commissioner of the Agra Division.

JUDGMENT.

TWEEDY, J. M.—The applicant, who was plaintiff in the profit suit, was absent on 5th August and the Court dismissed the suit in default, regardless of the fact that defendant admitted part of the claim and acknowledged that profits were due on actual collections. That order was so glaringly illegal as to give the Board jurisdiction under section 185. The same is true of the order of the 4th September refusing to review the order of the 5th August.

I would quash both orders and direct a re-trial by the Assistant Collector according to law. Any cost before the Commissioner or the Board will be costs in the case.

BAILLIE, S. M.—I concur.

Reference allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL NO. 259 OF 1914.

March 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

PICHI AIYAR AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

SUBBARAYAR *alias* SUBRAMANIA AIYAR—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11, Expl. IV—Set-off, claim of, not put forward—Subsequent suit for that amount, whether barred—Res judicata.

A defendant who can claim set-off is not bound to put forward his claim in answer to the suit against him, and his failure cannot take away his right to sue for the amount subsequently.

Appeal, under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Ayling, dated the 12th March 1914, in Civil Revision Petition No. 188 of 1913, preferred against the decree of the Court of the Subordinate Judge of Trichinopoly in Small Cause Suit No. 1407 of 1912.

Messrs. *S. Varadachariar* and *S. Parthasarathy Aiyar*, for the Appellants.

Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—The decision of the learned Judge is right. Mr. Varadachariar draws attention to the written statement in the suit of the Manager against the subscriber and argues that the claim for profits was pleaded in that suit and must be deemed to have been decided against the subscriber; the defence in that case was one of discharge and no question of set-off arose for decision.

The learned Vakil broadly contends that in all cases where independent obligations arise out of the same contract, the defendant is bound to plead his claim by way of reduction of the amount sued for. We do not think that such a contention is well founded. The authorities cited by him, *Vinayak* v. *Dattatraya* (1) and *Rukminibai* v. *Venkatesh Bab Prabhu* (2), do not support him in that contention. In those cases, the learned Judges held that the plaintiff omitted to sue for a right which was an adjunct to the main right claimed and that it was not open to him to agitate the matter again.

A defendant who has a claim for set-off is not bound to put it forward in answer to the suit against him and his failure cannot take away his right to sue for the amount subsequently.

There can be no *res judicata* under such circumtances. We dismiss the appeal with costs.

Appeal dismissed.

(1) 26 B. 661; 4 Bom. L. R. 492.
(2) 31 B. 527; 9 Bom. L. R. 958.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION NO. 2 OF 1911-12 OF FARRUKHABAD DISTRICT.

March 23, 1912.

Present:—Mr. Baillie, S. M., and Mr. Broun, J. M.

BHARAT INDU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MISRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Grove—Custom—Tenant, right of, to cultivate—Payment of rent—Landlord, right of, to get rent assessed.

A tenant is not entitled to bring a grove land under cultivation and to hold it free from payment of rent. The land-holder is entitled to have rent assessed on such land. [p. 35, col. 1.]

Second appeal from an order of the Commissioner of the Agra Division, dated the 23rd September 1911, reversing that of the Assistant Collector of Farrukhabad, in the case of assessment of rent.

JUDGMENT.

BAILLIE, S. M.—(*February 23rd*, 1912.)—The land in question is old grove land and 8 old trees still stand on it. It appears that 20 or 25 new trees have been planted. The land is, however, now under cultivation of the same character as is usual in the best cultivated land. It is growing potatoes, *kachiana*, wheat and barley. The Court of first instance held that inasmuch as the land was held free of rent and was cultivated land, the land-holder was entitled to have rent assessed on it. The Commissioner held that the land was still grove, that the tenant was entitled to maintain the grove and retain possession of it and, therefore, cancelled the assessment of rent on it. Now it may be true, though this is not proved, that in accordance with custom

the tenant was empowered to re-plant this land and to retain possession of it, but he was not in any way entitled to bring it under cultivation and after having so brought it, to hold it free from payment of rent. The present suit is not for ejectment, it is for assessment of rent and, in my opinion, the area being cultivated land within the meaning of the definition in the Rent Act, the proprietor is entitled to have rent fixed on it. I would allow the appeal and restore the order of the Court of first instance. Costs on respondent.

BROUN, J. M —I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1911-12 OF ALLAHABAD DISTRICT.

November 20, 1912.

Present:—Mr. Baillie, S. M., and Mr. Tweedy, J. M.

SAHAI AND ANOTHER—DEFENDANT—APPELLANT

versus

ALI BAKSH—PLAINTIFF—RESPONDENT.

Ejectment, suit for—Parties—All co-sharers must join unless agent appointed—Lambardar *as such, power of, to eject.*

All the co-sharer landlords must join in a suit for ejectment unless they appoint an agent for the same.

A *lambardar* as such has no power of ejectment.

Selected Decision No. 2 of 1910, discussed and ollowed.

Second appeal from an order of the Commissioner of the Allahabad Division, dated the 14th May 1912, reversing that of the Assistant Collector, first Class, of Allahabad District, in the case of ejectment.

JUDGMENT.

BAILLE, S. M.—(*November 14th*, 1912.)—Respondent, the *lambardar*, sued for the ejectment of a tenant. It appears that respondent collects only half of the rent from the appellant and that the remaining half is collected by the mortgagees in possession. The Court of first instance decided that in these circumstances the *lambardar* was not entitled to sue for ejectment without the concurrence of the mortgagees, who were in possession and collected the share of the rent. The Commissioner distinguishes this case from Selected Decision No. 2 of 1910, in which Mr. Porter pointed out that a co-sharer is not, owing to the mere fact of being *lambardar*, empowered to eject when he does not collect the rent. In the opinion of the Commissioner the cases were differentiated by the fact that in the case in which the Selected Decision No. 2 of 1910 was given the entire rent was collected by persons other than the *lambardar* and that in the present case the *lambaadar* collects part of the rent. There is, I agree, this distinction between the two cases, but the principles laid down by Mr. Porter in Selected Decision No. 2 of 1910 and case No. 17 mentioned in the above Selected Decision apply generally. The power of ejectment is given to the land-holder. The land-holder is the person entitled to receive rent. In the present case the *lambardar* is only one of the land-holders, the mortgagees in possession are also land-holders and under section 194 all the land-holders must bring a suit for ejectment unless they have appointed an agent for the purpose. For respondent, reference is made to the *wajib-ul-arz* of the village which contains an entry that the *lambardar* had power of collection, and to a Selected Decision of 1903 in which the powers generally enjoyed by the *lambardar* are mentioned. The *wajib-ul-arz* no longer applies and the Selected Decision does not, in any way, hold that the *lambardar* has, as such, the powers of collection of rent or ejectment. It simply states that he ordinarily has it. In the present case he has not, he is not the land-holder. I would allow the appeal with costs on respondent.

TWEEDY, J. M.—I concur.

Appeal allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 12 OF 1912-13 OF ALLAHABAD DISTRICT.

April 18, 1913.

Present:—Mr. Baillie, S. M.

PYARE LAL—PLAINTIFF—APPELLANT

versus

RAM BHAROSE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 11—Occupancy right, acquisition of—Sub-letting, meaning of—Allowing brother to cultivate, if sub-letting—Period, if counted in continuous possession.

Sub-letting implies the leasing of land at a fixed rent to a sub-tenant.

Therefore, if a tenant allows his brother to cultivate a part of the land or associates him with himself in cultivation, there is no sub-letting and this period can not be deducted under section 11 of Act II of 1901 from the period of acquisition of occupancy rights.

Second appeal from an order of the Commissioner, Allahabad Division, dated the 23rd September 1912, reversing that of the Assistant Collector, first Class of Allahabad District, in the case of ejectment.

JUDGMENT.—The respondent has cultivated since 1304 *Fasli*, a period of 16 years. The question is whether he has acquired occupancy rights. The appellant, a *zemindar*, claims in the first place to exclude 1304, the year in which the *patta* was executed. It is well-recognised revenue law that an ordinary cultivating *patta* not securing a right to continue to cultivate beyond the year for which it was granted, is not a lease for a fixed period, that it is simply an instrument which fixes the rent to be paid from year to year. The year for which the *patta* was granted, therefore, counts.

The main question, however, is whether a period during which a part of the land was recorded as cultivated by the brother of the respondent as sub-tenant, should be excluded or not. The Commissioner has held that the fact that appellant allowed his brother to cultivate a part of the land did not amount to a sub-letting and in this opinion I concur. It appears that the brothers have either together or separately been cultivating this land and in certain years apparently they cultivated separate fields. I do not consider that this amounts to sub-letting. The provisions as to sub-letting must be strictly construed and sub-letting, I understand, implies the leasing of land at a fixed rent to a sub-tenant. In this case the position appears to be simply that the respondent associated his brother with himself in the cultivation of this holding. There was no formal or definite sub-letting. Agreeing with the Commissioner I dismiss the appeal with costs on appellant.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 446 OF 1913.

March 17, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

S. RAMASWAMI PATTER—DEFENDANT—APPELLANT

versus

TIRUCHA MANNADIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Limitation Act (IX of 1908), s 19—Promise to pay amount due—Acknowledgment of liability—Appellate Court, powers of, to decide points of limitation.

An Appellate Court can decide questions of limitation, if no further facts than those before it, are necessary for that purpose. [p. 37, col. 1.]

Kunhi Marakkar Haji v. *Kutti Umma*, 20 M. 496; *Subbayya* v. *Rami Reddi*, 22 M. 344, followed.

A promise to remit money due under a particular document is "an acknowledgment" within the meaning of section 19 of the Limitation Act, sufficient to save limitation. [p. 37, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge of Palghat, in Appeal Suit No. 194 of 1911, preferred against that of the Court of the District Munsif of Palghat, in Original Suit No. 404 of 1909.

Mr. *N. A. Vaidyanatha Aiyar*, for Mr. *C. V. Ananthakrishna Aiyar*, for the Appellant.

Mr. *T. K. Govinda Aiyar*, for the Respondents.

JUDGMENT.—In the lower Appellate Court no objection was taken to the finding that the suit was in time. Having regard to *Kunhi Marakkar Haji* v. *Kutti Umma* (1) and *Subbayya* v. *Rami Reddi* (2), the question

(1) 20 M. 496.
(2) 22 M. 344.

of limitation argued in this Court, as it appeared to us, is that the point can be decided without remanding the case to the lower Appellate Court. We feel no hesitation in holding that the promise to remit the money in Exhibit B11 refers to the claim made under Exhibit G and to the further claim on account of renewal fees. We are not satisfied that Article 64 of the Limitation Act will cover this case. There has been no account in writing signed by the defendant. But we think that Exhibit B is an acknowledgment of liability and as such it saves the bar of limitation. In this view, there is no other question to be decided.

We dismiss the second appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 19 OF 1911-12 OF ALLAHABAD DISTRICT.

November 16, 1913.

Present:—Mr. Baillie, S. M.

GANESH—DEFENDANT—APPELLANT

versus

Musammat SAHIB-UN-NISSA BIBI—PLAINTIFF—RESPONDENT.

Alluvial accretion—Non-occupancy holding, accretion to—Occupancy rights in accretion, acquisition of—Limitation.

Occupancy rights in an alluvial accretion to a non-occupancy holding arise only by twelve years' continuous cultivation of that accretion.

Second appeal from an order of the Commissioner of the Allahabad Division, dated the 15th May 1912, reversing that of the Assistant Collector of Allahabad District, in the case of ejectment.

JUDGMENT.—Appellant in this case complains that the Commissioner placed him at a disadvantage by admitting fresh evidence and arriving at a finding on facts which had not come to the notice of the Court of first instance. He admits that the land held by Binda before 1310 was only 1 *bigha* 18 *biswas* and the whole holding of the appellant is now 7 *bighas* 11 *biswas*. He claims, *first*, that the land held by Binda is part of the present holding and *second*, that the remainder is an alluvial accretion on that holding. The first claim appears to be

correct. The second does not benefit him, as, if this were an alluvial accretion in 1310, it was not an accretion on an occupancy holding, it was an accretion on a non-occupancy holding and occupancy rights can accrue in it only under the ordinary provision of the law by 12 years' continuous cultivation.

The Commissioner's judgment shows that the evidence of the *patwari*, on which the continuity of the possession of Binda and that of the appellant was based, was not worthy of credit. I am unable to differ from the Commissioner's opinion in this matter. I do not consider that it has been shown that the entry in Binda's name and that in appellant's has reference to a holding continuously held by the family. The sudden entry of the entire area of 7 *bighas* 11 *biswas* in 1310 indicates a different conclusion. I find no reason for interfering with the Commissioner's decision and dismiss the appeal with costs on appellant.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 46 OF 1913.

February 2, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

Raja MULRAZZU LAKSHMI VENKIAH AMMA ROW BAHADUR—PLAINTIFF—APPELLANT

versus

THE OFFICIAL ASSIGNEE OF MADRAS—DEFENDANT—RESPONDENT.

Presidency Towns Insolvency Act (III of 1909)—Entrustment of sovereigns and gold to jeweller—Conversion—Insolvency of jeweller—Relationship between parties constituted by transaction, nature of—Person entrusting, whether entitled to preferential payment or to rank pari passu *with general body of creditors—Trust property, following of—Tracing and* quasi-*charge, doctrines of, if applicable.*

Where a jeweller, who was entrusted by the claimant with sovereigns and gold to be made into a jewel for him converted the same into cash and subsequently became bankrupt and after the Official Assignee took charge of his estate, the owner of the sovereigns and gold put forward a claim that he was entitled to a preferential treatment and to get out of the estate the full value of the sovereigns and gold entrusted by him to the bankrupt:

Held, that the transaction between the claimant and the jeweller amounted to a bailment

and the jeweller became, in consequence, a trustee for the claimant in respect of the sovereigns and gold entrusted to him; [p. 39, col. 2].

Held, further, that inasmuch as there was no evidence that the sovereigns and gold formed a portion of the estate taken possession of by the Official Assignee and as there was nothing to identify the same, the claimant was not entitled to the benefit of the doctrines of tracing and *quasi*-charge and, therefore, to any preferential payment, but was only entitled to rank *pari passu* with other creditors of the insolvent. [p. 41, col. 1.]

In re Hallett's Estate, 13 Ch D. 696; 49 L. J. Ch. 415; 42 L.T. 421; 28 W.R. 732 and *Sinclair* v. *Brougham*, (1914) A. C. 398; 83 L. J. Ch. 465; 111 L. T. 1; 58 S. J. 302; 30 T. L. R. 315, followed.

Harris v. *Truman*, 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533; 9 Q. B. D. 264; *Ex parte Kelley and Co.*, 11 Ch. D. 306; 48 L. J. Bk. 65; 40 L. T. 404; 27 W. R. 830, *In re Oatway, Hertslet* v. *Oatway*, (1903) 72 L. J. Ch. 575; 88 L.T. 622; 2 Ch. 356; *Frith* v. *Cartland*, 2 H. & M. 417; 34 L. J. Ch. 301; 11 Jur. (N. S.) 238; 12 L. T. 175; 13 W. R. 493; 71 E. R. 525; 144 R. R. 202 and *Official Assignee* v. *Rajam Iyer*, 6 Ind. Cas. 383; 7 M. L. T. 401; 33 M. 299; (1910) M. W. N. 451, referred to.

Appeal from the judgment of the Hon'ble Mr. Justice Bakewell, dated the 22nd April 1914, in Insolvency Jurisdiction of the High Court.

FACTS.—This is an appeal under the Presidency Towns Insolvency Act, III of 1909, against an order of the Commissioner in Insolvency dismissing the notice of motion taken out by the appellant claiming to rank as a preferential creditor.

The appellant gave the insolvent forty-five sovereigns and some gold for being made into a gold *oddiyanam* (waist ornament). The insolvent did not make the ornament, but used the sovereigns and gold "for his own purposes for other work." The appellant claimed that there was an entrustment of the sovereigns and gold to the insolvent, that the latter was, therefore, a trustee or a bailee for him, that he was in consequence a preferential creditor, entitled to follow the estate and to have his claim for the value of the sovereigns and gold satisfied in full out of the estate in the hands of the Official Assignee.

Bakewell, J., who heard the application, sitting as a Commissioner in Insolvency, held that the insolvent did become a bailee for the claimant but that as it was impossible to trace what became of the sovereigns and gold, the latter was only entitled to rank *pari passu* with other creditors. The claimant then preferred this appeal.

Mr. *M. D. Devadoss* (instructed by Mr. *M. K. Ramaswami Iyer*), for the Appellant:—Where a trustee converts trust property and adds it to his private property and then becomes insolvent, the trustee in bankruptcy or the Official Assignee can only take the property of the insolvent subject to the right of the person who entrusted the property to be treated as a preferential creditor. The *cestui que trust* is entitled to follow the entrusted property into whatever form it may assume. So long as trust property can be traced, the beneficiary is entitled to treat the converted property as trust property. See *In re Hallett's Estate* (1). The beneficiary is entitled to a charge on the new property purchased, even though with mixed funds. The tracing need not be by actual evidence. It can be done by showing that the trust funds have gone to swell the estate. *Sinclair* v. *Brougham* (2) and *In re Oatway*; *Hertslet* v. *Oatway* (3). This principle is applicable even in the case of chattels. *Harris* v. *Truman* (4).

[SADASIVA IYER, J.—Suppose cash and jewels in the hands of the insolvent were there even before your entrustment. Can you still claim the charge?]

The case in *Official Assignee of Madras* v. *Rajam Iyer* (5) is of that kind. There was no cash or jewellery; still the High Court held that the beneficiary must be paid first. The facts in this case show that it is a case of a specific bailment. It is not a case of creditor and debtor at all.

Mr. *Sidney Smith*, for the Respondent:—This is not a case of entrustment at all. Nor is it a case of bailment. See Pollock and Mulla's Contract Act, page 484. In a bailment the thing entrusted will have to be specifically returned. There is nothing to show what became of the sovereigns or gold. They have not been traced to the hands of the Official Assignee. To 'follow' property, identification is necessary. The burden is on the person claiming preferential treatment. See *Sinclair* v. *Brougham* (2). No evidence has been let in by the claimant in this case. See also *In re Hallett's Estate* (1).

(1) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.

(2) (1914) A. C. 398 at p. 418; 84 L. J. Ch. 465; 111 L. L. 1; 58 S. J. 302; 30 T. L. R. 315.

(3) (1903) 2 Ch. 356; 72 L. J. Ch. 575, 88 L. T. 622.

(4) 9 Q. B. D. 264; 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533.

(5) 6 Ind. Cas. 383; 7 M. L. T. 401; (1910) M. W. N. 451; 33 M. 299.

Mr. *M. D. Devadoss*, in reply:—The only question raised before the Commissioner was as to the liability of the insolvent's estate. No question was raised as to the estate not having been benefited at all, nor as regards the identity.

JUDGMENT.

SADASIVA AIYAR, J.—This is an appeal by a creditor whose notice of motion was dismissed by Mr. Justice Bakewell in the exercise of insolvency jurisdiction. The creditor (appellant) contended that he was entitled not merely to get a rateable distribution along with the other creditors, but that he was entitled to get the full amount due to him by the insolvent in preference to the other creditors of the insolvent (from and out of the insolvent's estate) inasmuch as he gave 45 sovereigns and 26½ *pagodas* weight of gold for the specific purpose of making a gold *oddiyanam* and 4 *mettus* by working the specific gold in the said sovereigns and the said gold bar, and as the relation between the insolvent and himself was one of bailment and not that of creditor and debtor in an ordinary loan transaction.

The learned Judge found (*a*) that the insolvent did become bailee of the specific gold given to him as metal and that there was not the relation of ordinary creditor and debtor created (by the giving of the sovereigns and the gold to the insolvent) between the petitioner and the insolvent; (*b*) that it was impossible "to have this specific gold," now that "it does not even appear that at the date of the insolveney, the insolvent was possessed of any sovereigns or bar gold with which the applicant's property might have been mixed," and that the sovereigns and the gold have "disappeared and cannot be followed." On these findings the learned Judge held that the petitioner, even taking him to be a *cestui que trust* and taking the insolvent as a trustee, had no greater right over the general property of the trustee than the other creditors have. In arriving at this conclusion, the learned Judge states that he followed the principle laid down in *In re Hallett's Estate* (1).

The contentions before us in appeal are, (1) that the appellant was entitled to preferential payment on the finding that the insolvent was a trustee and (2) that the Official Assignee has not denied the presence of gold and ornaments at the time of the failure of the insolvent's firm among the assets of the firm (See 6th ground).

I might at once say that I accept the findings of fact arrived at by the learned Judge, though each side attacked that portion of the finding which was against it. Mr. Smith, for the Official Assignee, contended that the oral evidence established that the sovereigns and the gold given by the petitioner were not themselves intended to be wrought into the jewels, but that the price of those sovereigns and gold was to be treated as if the price was given in current cash on the insolvent's promise to give certain jewels of the same value to the petitioner. I think that the terms of the contract between the parties, as reduced to writing in Exhibits A and A2, clearly support the learned Judge's finding. On the other side, the appellant contended that the gold in the sovereigns and in the bar given by him could be traced to some jewels which were taken possession of by the Receiver and afterwards by the Official Assignee. There was no such proof adduced before the learned Judge and it is impossible to find that in the assets taken possession of by the Receiver or by the Official Assignee either the gold or the value of the gold due to the insolvent could be at all traced.

Accepting then the facts as found, what is the law on the point? I have considered to the best of my ability the arguments advanced on both sides in this case and also the decisions quoted. Those cases include *In re Hallett's Estate* (1), *Harris* v. *Truman* (4), *Ex parte Kelley & Co.* (6), the very recent case of *Sinclair* v. *Brougham* (2) in the House of Lords, where the whole question has been elaborately considered and the case *In re Oatway*; *Hertslet* v. *Oatway* (3). I have also considered the six well-known Arbuthnot & Co. cases reported as *Official Assignee of Madras* v. *Smith* (7), *Official Assignee of Madras* v. *Ramachandra Iyer* (8), *Official Assignee of Madras* v. *Lupprian* (9), *Official Assignee of Madras* v. *Krishnaswami Naidu* (10), *Official*

(6) 11 Ch. D. 306; 48 L. J. Bk. 65; 40 L. T. 404; 27 W. R. 830.

(7) 1 Ind. Cas. 712; 32 M. 68; 5 M. L. T. 164.

(8) 5 Ind. Cas. 974; 33 M. 134; 7 M. L. T. 214; (1910) M. W. N. 147.

(9) 5 Ind. Cas. 312; 33 M. 145; 7 M. L. T. 151; 20 M. L. J. 428.

(10) 5 Ind. Cas. 331; 33 M. 154; 7 M. L. T. 266; (1910) M. W. N. 130.

Assignee of Madras v. *Rajam Iyer* (5) and the last case on appeal in *Official Assignee of Madras* v. *Rajam Iyer* (5).

Taking the pronouncement of the Lord Chancellor in the recent House of Lords case as enunciating the binding law on this point, I think it establishes (1) that where the moneys of *A* get into the hands of *B* (who afterwards becomes an insolvent or if *B* is a Society or Company whose affairs are in liquidation) and where the relation of creditor and debtor by *contract or quasi-contract* cannot be established between *A* and *B*, *A* can recover his moneys preferentially on the principle of "tracing" in two cases, (*a*) where *A*'s money can be earmarked in the hands of *B* (as where the money of *A* was contained in a bag and the bag with the contained money in specie could be identified); (*b*) where any particular asset was purchased by *B* with that money, if that particular asset is capable of being earmarked as purchased with that money. (2) That case further establishes that where the money of *A* was mixed by *B* with his own money in *B*'s Bank and appropriated by *B* and there is or can legally be no contract or *quasi*-contract by *B* establishing the ordinary relationship of creditor and debtor, there is what is called loosely a "charge" in *A*'s favour on the balance of all the moneys found in the Bank to the credit of *B* (at the time of *B*'s insolvency or liquidation) to the extent of the money which is due to *A*, and that charge entitles *A* to be preferentially paid out of those moneys, preferentially to ordinary creditors.

The whole law upon this point seems to have been developed from the observations of Vice-Chancellor Wood in *Frith* v. *Cartland* (11), and had its origin in the principle that a *cestui que trust*, if he can trace the trust property to a fund standing in the name of the trustee or to an asset in the hands of the trustee, should be preferentially paid out of that fund or out of that asset. In the 1914 case in the House of Lords, the doctrine of "tracing" was extended in favour of the persons who did not stand in the relation of *cestui que trustent* (even in the limited sense of bailors or principals), provided that they cannot be treated as creditors under even a *quasi*-contract or implied contract.

The majority of the Judges in *In re Hallett's Estate* (1) held that the rule in *Clayton's* case (12) as to the appropriation of cheques drawn upon a Bank to the moneys deposited there in order of dates was not applicable where the dispute is between the Official Assignee of a trustee *B* and the *cestui que* trust *A*, whether a balance in the Trustee's Bank is or contains the trust money belonging to *A*. Thesiger, L.J., dissented from the view of the majority which held that the rule was not applicable and that the balance should be traced to the trust money, though cheques had been for the full amount of the money, in priority to cheques affecting subsequent deposits to the trustee of his own moneys. The House of Lords' case has left this second question undecided.

The necessity of tracing what I might roughly call the misappropriated funds into the assets in the hands of *B* (of so tracing it, at least in an indirect manner and by reasonable presumptions), has not been questioned in this latest case. The Lord Chancellor seems even to lay down in one portion of his judgment that it lies upon *A* to establish by evidence that the assets in the hands of *B* do or must contain funds belonging to him. [*Sinclair* v. *Brougham* (2). See also the argument in the same case at page 406, proposition 3, in which the learned Counsel says "the burden of proving the identity is on the person who alleges it]". The burden of proof may be discharged by a sort of eliminating process, that is, *A* might establish that the remaining securities, investments and assets in the possession or name of *B must* be the result of the use of *A*'s funds. In that same case, their Lordships held on the facts that the funds in the hands of *B* (a statutorily constituted society), which received the moneys from the depositors on *ultra vires* transactions, must have contained the said moneys of the depositors and the increase of those moneys and hence their Lordships had no difficulty in applying the doctrine of tracing in that case, especially as the claims of ordinary outside creditors had been fully discharged.

(11) 2 H. & M. 417; 34 L. J. Ch. 301; 11 Jur. (N. S.) 238; 12 L. T. 175; 13 W. R. 493; 71 E. R. 525; 144 R. R. 206.

(12) 1 Mer. 572; 15 R. R. 161; 35 E. R. 781.

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MULRAZZU LAKSHMI *v.* OFFICIAL ASSIGNEE.

In the case of *Harris* v. *Truman* (4) and *In re Oatway, Hertslet* v. *Oatway* (3) also, the necessity of *A*'s establishing that his property, whether it was money or chattels or the proceeds of his chattels, was or must form a part of the whole of the assets or funds in the hands or name of *B*, was not denied. In the former case, though the assets (in the shape of barley and malt) were not purchased with *A*'s moneys which had been misappropriated by *B* (*A*'s agent employed expressly to purchase barley and malt for *A*), *B* did make those purchases for *A* in order to fulfil his obligation as agent to *A* to so purchase barley and malt for *A* and in those circumstances, *A* was held entitled to ratify the appropriation by his agent (though that appropriation was made to conceal his breach of trust) and to treat his (*A*'s) moneys as traced to the barley and malt purchased with the other moneys of *B*. If, in this case, I could have found my way to decide that the assets taken possesssion of by the Receiver or by the Official Assignee did include or must have included the gold or the value of the gold contained in the sovereigns and the bar given by the petitioner to the insolvent, or that though the petitioner's particular gold was misappropriated by the insolvent, he made *oddiyanams* or *mettus* with other gold [as in the case in *Harris* v. *Truman* (4)] *in order to fulfil his obligations to the petitioner*, I would be inclined to apply the doctrine of "tracing" and the doctrine of *quasi*-charge even to the full limits indicated by Lord Dunedin in his judgment in the recent House of Lord's case; but I do not see my way to differ from the finding of Mr. Justice Bakewell (which I take to be) that the petitioner has failed to show that the gold or the price of that gold was invested in or formed part of any of the assets taken possession of by the Receiver or by the Official Assignee, and I must, therefore, confirm the order of the learned Judge which held, that the petitioner must be treated as a man who had lost the gold entrusted by him to the insolvent, just as if the insolvent had converted it into cash and squandered it in unknown ways before his insolvency. On the finding, then, that none of the assets found with the insolvent is proved directly or even by remote fact, from which a reasonable inference could be drawn, to have contained any portion of the petitioner's gold or to have been acquired with the use of the proceeds of that gold, I must and do confirm the order of the learned Judge. But as it is a hard case for the appellant and as the legal question involved is an intricate one, which even the most learned English Judges have found it so difficult even to formulate for decision in all its subtle ramifications, I shall, while directing the appellant to bear his own costs in this appeal, not direct him to pay the respondent's costs, which will, of course, come out of the insolvent's estate.

NAPIER, J.—This is an appeal from an order of Mr. Justice Bakewell in Insolvency Petition No. 188 of 1912, rejecting an application for the return by the Official Assignee of certain sovereigns and bar gold given by the applicant to the insolvent for the purpose of making ornaments, or for payment of their value. The learned Judge finds on the evidence, and we agree with him in that conclusion, that the sovereigns and the bar gold were given as alleged for a specific purpose, that the insolvent, instead of obeying the directions, credited the applicant with the sovereigns as cash and used the gold for other work. There is no evidence to show what became of the sovereigns, nor is there any evidence that the jewel into which the bar gold had gone was in the possession of the insolvent at the time that a Receiver was appointed to take charge of his property, which was done sometime prior to the insolvency. The amount of the gold was $26\frac{1}{2}$ *pagodas*, which is nearly 3 oz. On these facts the learned Judge has held that the applicant's property has disappeared and cannot be followed, and applying the law as laid down in *In re Hallett's Estate* (1), dismissed the application.

It was contended before us that the appellant could recover as a preferential creditor on the principle that if the estate has been benefited by the transaction, the value of the specific moveable can be recovered. It is sufficient to say that there is no authority for this broad proposition.

It was next argued that the insolvent being a bailee of the specific gold, the applicant was entitled to follow it into any property possessed by the insolvent. Reliance is placed on *Official Assignee of Madars* v. *Rajam Iyer* (5). That, however, is no

authority for the proposition, that being a case where money stamped with the position of trust money was mixed with the insolvent's own money. During the course of the argument, I invited the attention of the learned Counsel for the appellant to the recent decision of the House of Lords in *Sinclair* v. *Brougham* (2), the well-known Birkbeck Bank case and he endeavoured to find support for the proposition in various passages in the judgment of the learned Lords. What he sought in effect to do was to apply the principle under which trust moneys, which were mixed, can be followed to specific moveables held by the insolvent. This case is no authority for that position. Their Lordships certainly re-affirm the proposition laid down in *In re Hallett's Estate* (1), that "where trust money has been mixed by an insolvent with his own moneys, the law will presume that any money drawn from that mixed account by the insolvent was his own money and that the balance remaining unexpended was the trust money." But with regard to specific moveables held by the insolvent as bailee, their Lordships state the law as already established, *vide* *Sinclair* v. *Brougham* (2): "If money in a bag is stolen and can be identified in the form in which it was stolen, it can be recovered in *in specie*. Even if it has been expended by the person who has wrongfully taken it,in purchasing some particular asset, that asset, if capable of being earmarked as purchased with the money, can be claimed by the true owner of the money." If it was impossible to establish that these sovereigns and bar gold had been converted into any particular jewel, the appellant might claim that jewel. But admittedly this cannot be shown. There is nothing in *In re Oatway*; *Hertslet* v. *Oatway* (3), inconsistent with this doctrine, which is clearly established in *In re Hallett's Estate* (1). The basis of the right to follow is stated to be that the claim is one *in rem* "the claim to follow and recover property with which in equity at all events they have never really parted." It is obvious that if the claim is *in rem*, the *res* must be ascertained. I am, therefore, clearly of opinion that the judgment of the learned Judge was right and must be affirmed. I agree with the order as to costs made by my learned colleague.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 2 OF 1912.

October 23, 1914.

Present:—Mr. Fawcett, A. J. C., Mr. Crouch, A. J. C., and Mr. Pratt, J. C.

HOTCHAND GULABRAI—APPELLANT

versus

MANGHANMAL GULABRAI AND OTHERS —RESPONDENTS.

Hindu Law—Mitakshara—*Partition—Joint family property—Lunatic co-parcener—Lunacy not congenital but subsequent—Right of such co-parcener to share on partition.*

Where the plaintiff, a lunatic, sued through a next friend for partition of the family estate of which he would, if sane, be certainly entitled to a share, and it was found that the lunacy was not congenital but subsequent:

Held, per *Crouch*, *A. J. C.*, that there was nothing in the *Mitakshara* from which could be deduced a clear rule of law that a man who on birth entered into a joint family holding joint property, lost that interest on becoming lunatic. [p. 45, col. 1.]

Tirbeni Sahai v. *Muhammad Umar*, A. W. N. (1905) 265; 3 A. L. J. 4; 28 A. 247, followed.

Ram Sahye Bhukkut v. *Lalla Laljee Sahye*, 9 C. L. R. 457; 8 C. 149; 6 Ind. Jur. 306 and *Ram Soondur Roy* v. *Ram Sahye Bhugut*, 8 C. 919; 7 Ind. Jur. 85, dissented from.

(Per *Fawcett*, *acting J. C.*, dissenting):—That the *Mitakshara* intended the rules relating to 'exclusion from inheritance' to apply to both cases of inherited, as well as joint family property; that the principle on which the disqualification is based, *viz.*, the inability to perform sacrifices, applied equally to cases other than congenital; and that the plaintiff being insane at the time of the proposed partition was excluded from any participation in the joint estate. [p. 46, col, 1; p. 47, col. 2.]

Abilakh Bhagat v. *Bhekhi Mahto*, 22 C. 864 and *Murarji* v. *Parvatibai*, 1 B. 177, dissented from.

Ram Sahye Bhukkut v. *Lalla Lalji*, 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306 and *Ram Soondur Roy* v. *Ram Sahye Bhugut*, 8 C. 919; 7 Ind. Jur. 85, followed.

Tirbeni Sahai v. *Muhammad Umar*, 28 A. 247; A. W. N. (1905) 265; 3 A. L. J. 4, distinguished.

Held (Per *Pratt*, *J. C.*), that under the *Mitakshara*, which is the paramount Hindu Law authority in Sind, the disqualifications relating to 'exclusion from inheritance' apply not only to cases of obstructed but also to cases of unobstructed heritage, but in the case of the latter in joint family property they must apply at the time of birth, for that is the time when the rights would accrue if there were no disabilities; that to hold otherwise would necessitate the divestment of rights already vested, which is contrary to the general rule of Hindu Law; and that, therefore, subsequent lunacy could not divest the plaintiff of his right to the joint family property. [p. 48, col. 2; p. 49, col. 1.]

Ram Sahye v. *Lalla Laljee Sahye*, 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306, dissented from.

Abilakh Bhagat v. *Bhekhi Mahto*, 22 C. 864, followed.

HOTCHAND GULABRAI *v.* MANGHANMAL GULABRAI.

Appeal from a decision of the first class Subordinate Judge, Sukkur.

Mr. *Rupchand Bilaram*, for the Appellant.

Mr. *Fatehchand Asudamal*, for the Respondents.

JUDGMENT.

CROUCH, A. J. C.—(*September* 1*st*, 1914.)—Plaintiff, a lunatic so found, sues by his wife as next friend for partition of the family estate of which he could, if sane, be certainly entitled to a share. Plaintiff became lunatic six years before suit, his father died four years before suit. The lower Court has dismissed the suit, holding on the authority of *Ram Sahye Bhakkat* v. *Lalla Laljee Sahye* (1), *Ram Soondur Roy* v. *Ram Sahye Bhugut* (2), that plaintiff is disqualified from inheriting, or from claiming partition and that his suit was not maintainable on account of his being of unsound mind.

Plaintiff appeals. Mr. Rupchand, in argument, has contended that, to disqualify a lunatic from claiming partition of joint family property, he must be lunatic from birth when his right in the family property vests. He relies on *Tirbeni Sahai* v. *Muhammad Umar* (3). Before examining the authorities, let us first consider the case in the light of well-known accepted principles of Hindu Law. Mayne says (6th Edition, page 323): "The whole body of (such) an undivided Hindu family, consisting of males and females, constitutes a sort of corporation, some of the members of which are co-parceners, that is, persons who on partition would be entitled to demand a share, while others are only entitled to maintenance.....Each person is simply entitled to reside and be maintained in the family house, and to enjoy that amount of affluence and consideration which arises from his belonging to a family possessed of greater or less wealth. As he dies out, his claims cease, and as others are born their claims arise. But the claims of each spring from the mere fact of their entrance into the family, not from their taking the place of any particular individual. Deaths may enlarge the beneficial interest of the survivors, by diminishing the number who have a claim upon the common fund, just as births may diminish their interests by increasing the number of claimants. But, although the fact that *A* is the child of *B* introduces him into the family, it does not give him any definite share of the property, for *B* himself has none. Nor upon the death of *B* does he succeed to anything, for *B* has left nothing behind to succeed to.....Until they elect to do so, the property continues to devolve upon the members of the family for the time being by survivorship and not by succession." "There is no such thing as succession properly so called in a Hindu family. It is very important to note that the right which the son takes at his birth in the ancestral property is wholly independent of his father. He does not claim through his father". (Mulla, section 183). A right to partition is one of the ordinary incidents of co-parcenary.

Now it is obvious from the nature of the estate enjoyed by a member of an undivided Hindu family, that plaintiff became vested with his interest in the family property at the time of his birth, and that the mere death of plaintiff's father could not have operated to divest him of this interest. Nor could he have been divested of his interest by the mere process of endeavouring to enforce it by filing a suit. The only possible theory open to defendants appears to be that by becoming lunatic he was divested. Before a Court will hold a person entitled to expropriate some other person from his estate and appropriate it to himself, it will require absolutely convincing proof that the law not only justifies such being done, but that the appropriate rule of law is so clear that it must be done.

In *Ram Sahye Bhukkut* v. *Lalla Laljee Sahye* (1), it was held that a co-parcener who has become insane, subsequent to his birth, could not claim partition. This decision was based on *Mitakshara*, part II, Chapter II, section 10, verses 1, 3 and 6. In *Ram Soondur Roy* v. *Ram Sahye Bhugut* (2), the learned Judges relied on verse 6 of the same section of the *Mitakshara*. Mr. Fatehchand, who appears for the respondent, adds to these authorities Smriti Chandrika, Chapter V, section 9, and Viramitrodaya, Chapter VIII, sections 3 and 4.

It will be convenient to have before us these several verses relied on.

(1) 8 C. 149; 9 C. L. R. 457; 6 Ind. Jur. 306.
(2) 8 C. 919; 7 Ind. Jur. 85.
(3) 28 A. 247; A. W. N. (1905) 265; 3 A. L. J. 4.

Mitakshara, Chapter II, section X:—

1. The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs as well as the re-united parcener.

2. An impotent person or outcaste and his sons, one lame, a madman, an idiot, and others must be maintained excluding them, however, from participation.

3. Manu likewise ordains, "Impotent persons and outcastes are excluded from a share of the heritage and so are persons born blind and deaf as well as madmen, idiots, the dumb and those who have lost a sense."

6. They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs, is not deprived of his allotment.

Smriti Chandrika, Chapter V, section 9: It must be understood that such as appear at the time of division to have been afflicted with impotence, etc., are excluded from their shares and that the exclusion is not confined to those only that are naturally (that is, by birth) impotent or the like.

Viramitrodaya, Chapter VIII, section 4: The exclusion, again, of these takes place if their disqualification occur previously to partition (or succession), but not also if subsequently to partition (or succession), for there is no authority for the resumption of allotted shares.

The venerable Vijnaneswara says that if subsequently (to partition) or succession their defects are cured by medication or the like, they become entitled to obtain their shares.

Now the first nine sections of Chapter II of the *Mitakshara* seem to deal, beyond doubt, with succession. Section X is headed "On exclusion from inheritance," and this also suggests "succession;" but some confusion is created by the very vague definitions given in Chapter I, section 1. We there find "heritage" (*daya*) defined as "wealth which becomes the property of another solely by reason of his relation to the owner." "Inheritance" is said to be used in the sense of "unobstructed heritage" and "partition" is said to mean "heritage subject to obstruction."

In verses 17 to 22 after a discussion as to whether property arises from partition or whether partition presupposes property, the writer arrives at the conclusion that property does not arise by birth but by death of the owner (where only one heir) or by partition (where more than one heir). But it is expressly stated in section 27 that property in the paternal or grandfather's estate is only by birth.

In Chapter 1, section 8, of the Smriti Chandrika "heritage" is defined as wealth which becomes the property of one or more persons by reason of relation to the owner, and which admits of partition. And in section 9 it is stated: "The law of inheritance (*daya dharma*) means the rule of partition."

It appears, therefore, that the learned commentators, having no recognized term of jurisprudence such as tenancy-in-common to express the estate enjoyed by heir invented the term "partition"; and "before the division" and "at the time of division" appear to mean before and at the time when the estate devolved in severalty. "Heritage" also has its special meaning, wealth which a son inherits from a deceased parent solely because he is the son; but does not apparently include property which the son enjoys after his father's decease, because he had from his birth enjoyed a joint interest in it. By "son" is indicated any relation (verse 5). Inheritance, being "unobstructed heritage," is wealth which a man inherits from his father or paternal grandfather.

A most able attempt to reduce some of these passages to terms of modern jurisprudence has been made by Chandavarkar, J., in *Bai Parson* v. *Bai Somli* (4).

If we examine verses 1, 3 and 6 from the *Mitakshara* in the light of the definitions, we find that verse 1 refers to an exception "respecting the succession of the son, the widow and other heirs." This seems to point to succession and not survivorship, at any rate reference to survivorship is far from clear.

Verse 3 tells us of those who are excluded from the heritage. We know that "heritage"

(4) 15 Ind. Cas 774; 36 B. 424 at p. 429; 14 Bom. L. R. 400.

covers both obstructed and unobstructed property. This verse, again, may be referring to succession and not to survivorship.

Verse 6 is certainly open to the construction that it refers to tenancy-in-common, as also the verse from Smriti Chandrika, while the use, twice over, of the word partition (succession) in the verse from the Viramitrodaya seems conclusive as to its application.

While, then, it appears to me that the balance of probability is in favour of all the passages relied on being intended to refer exclusively to succession, it must, I think, be at least conceded that they offer only doubtful authority for the view accepted by the lower Court.

I can find nothing in any of the passages cited from which can be deduced a clear rule of law that a man who on birth enters into a joint family holding joint property, loses that interest on becoming lunatic. And no Court should, in my opinion, hold that property, which was admittedly the plaintiff's upto a certain date, became forfeit on that date, unless there is absolutely clear, indisputable authority for doing what is, *prima facie*, contrary to some of the most sacred principles of law and equity. It is, at any rate, clear that once the property which he takes by succession has vested, is not divested by lunacy, and it was so held in *Deo Kishen* v. *Budh Prakash* (5).

In *Tribeni Sahai* v. *Muhammad Umar* (3), the Court held that, if a person was not insane at birth, subsequent insanity did not deprive him of his right to share in the joint family property. The value of this decision is somewhat discounted by the fact that it is based entirely on *Deo Kishen* v. *Budh Prakash* (5), which in turn is based on passages from commentators which seem to have application only to separate property.

I would, however, follow the decision in *Tirbeni Sahai's* case (3), for it is consistent with the general principles of common law and equity and of Hindu Law, and I am of opinion that no sufficient authority has been shown us for holding that a member of a joint family is divested of his rights of a co-parcener as regards partition on becoming a lunatic; this is all that it is necessary to rule for the present case. No such authority being forthcoming, the ordinary rule of law, equity and good conscience should in my opinion, obtain.

I would reverse the decree of the lower Court and remand the case for trial.

FAWCETT, A. J. C.—I have given very careful consideration to the views expressed in my learned calleague's judgment, but regret that I do not concur in his conclusion.

The main point for determination is whether the verses 1,5 and 6 of section X of Chapter II of the *Mitakshara* apply also to the case of a co-parcener in a joint Hindu family who has an interest in the joint family property by birth, or only to the case of ordinary succession by inheritance as opposed to one by survivorship.

As those verses stand, they seem to me clearly to cover the case of a son, who is a member of joint family, as well as that of an heir, who succeeds by inheritance proper. Otherwise I fail to see what is the effect of the opening words in verse 1: "The author states an exception to what has been said by him respecting the succession of the son." This obviously refers to the sections in Chapter I dealing with this subject, more particularly sections II, III, V, VI, VIII, X, XI, and XII (I give the Nos. as appearing in Colebrooke's Translation). These mainly deal with the case of a son's share on partition and *prima facie*, therefore, the exception is meant to be one applicable in such a case.

As pointed out in Mayne's Hindu Law, 7th Edition, section 270, at page 333, "The Hindu lawyers always treat partition and inheritance as part of the same subject. The reason of this is that the normal state of the property, with which they have to deal, is to be joint property, and that they can only explain the amount of interest, which each member has in the property, by pointing out what share he would be entitled to in the event of a partition."

It is no doubt true that the term "*vibhaga*" which is generally translated by Colebrooke as "partition" covers the case both of partition and inheritance, and that the word "distribution" would be a better translation, as covering

(5) 5 A. 509; A. W. N. (1883) 105.

both cases (*cf.* note at page 171 of Gharpure's Collection of Hindu Law Texts, Volume III, No. 4). But there is, in my opinion, no sufficient ground for saying that it is generally used with reference to 'inheritance' rather than to 'partition' : in fact the contrary would be the natural presumption, for the reason given in the passage just quoted from Mayne's Hindu Law. And having regard to the treatment of 'partition' in the *Mitakshara* as a case of inheritance and the direct reference to the 'succession of a son' in verse 1, I can see no justification for the view that the author intends to limit the exception contained in this section X to cases of inheritance by succession as opposed to survivorship.

My view that section X covers both cases is, I think, strengthened by the reference in verse 1 to the "re-united parcener." This is the case dealt with in the preceding section IX and under verse 1 of that section such 're-united parcener' succeeds by survivorship to his deceased co-parcener, who leaves no issue actually born or then in the womb (*cf.* Mayne's Hindu Law, 7th Edition, section 586, at page 796).

If the disqualification mentioned in section X apply to his case, why should it not equally apply to the case of a son who is joint with his deceased father?

Again the provision in verse 6 that 'One already separated from his co-heirs is not deprived of his allotment," would seem to be quite unnecessary, if the exclusion dealt only with the cases of inherited property and did not extend to cases of partition in joint families.

It may also be noticed that section X does not appear in a Chapter dealing solely with cases of inheritance as opposed to partition. On the contrary, as already pointed out, the preceding Chapter deals with a case of the latter kind, and Chapter XII also relates to the subject of partition.

In my opinion it is far more likely that the *Mitakshara* intended the rules in section X relating to 'exclusion from inheritance' to apply to both cases than to only the latter case, and most unlikely that it intended them not to operate in the normal case of inheritance (in its wider sense) in a joint family. The rules are based on the principle that one who is unable to perform the necessary sacrifice is incapable of inheriting (see Mayne Loc. Cit., section 591, page 802), and this principle applies as much to a son in a joint family as to any other heir.

The argument that his disqualification would be opposed to the principle that he acquires an interest in the joint property by birth is not, I think, of any real weight in construing the *Mitakshara*. The latter work is supposed to have been written about the latter part of the 11th century (*Mayne*, section 26, page 28) and it cannot properly be construed in the light of subsequent developments in the law of partition. As is pointed out in Mayne's Hindu Law, section 244, page 313, it was only by very slow steps that the right to a partition reached its present form. According to the *Mitakshara*, a son could not partition from his father without his wish, unless the father was old, disturbed in intellect or diseased (Chapter 1, section 2, Volume VII, Mayne,page 314) and the normal partition was after the father's decease (Chapter 1, section 3). There is, therefore, nothing unnatural in its being treated as a case of succession, and the subsequent change of view referred to in Mayne's Hindu Law, section 252, at page 319, should not in my opinion be allowed to influence the construction of the *Mitakshara*.

Again, even according to the present law, a son has no definite ascertained share, until there is a partition; and the quantum of the share he may obtain on partition may vary from time to time according to the number of members of the co-parcenary. If it may become exceedingly small, why should it be against the principles of Hindu Law to vanish altogether? On the contrary, the principle on which disqualifications rest requires that it would vanish, as the disqualified person cannot perform the necessary sacrifices.

Then again, as is pointed out in *Krishna v. Sami*(6), the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exception in respect of property governed by the law of the *Mitakshara*. And the verse 4, Chapter VIII,

(6) 9 M. 64 at p. 78.

of Viramitrodaya, referred to in *Deo Kishen* v. *Budh Prakash* (5), clearly is intended to deal only with the case where a co-parcener has been allotted a share on partition or succession and subsequently becomes disqualified, and not to refer in any way to the case of mere undivided interest in joint property. That being so, it affords no real authority for the ruling in *Tribeni Sahai* v. *Muhammad Umar* (3).

I would also rely very strongly on the fact that both Mayne and West and Buhler treat the disqualification as applicable to cases of partition, as well as inheritance. See West and Buhler, 3rd Edition, Book II, paragraphs 4 and 6, at page 679, and Mayne, 7th Edition, section 484, page 654, and section 594 at page 807. If I err, at any rate, I err in good company.

It may be noted in this connection that the case of *Abilakh Bhagat* v. *Bhekhi Mahto* (7), in which Prinsep, J., expressed doubts as to the correctness of the law laid down in the cases of *Ram Sahye* v. *Lalla Laljee Sahye* (1) and *Ram Soondur Roy* v. *Ram Sahye* (2), is cited in note (*c*), page 812 of Mayne's 7th Edition, but he evidently did not share Prinsep, J.'s doubts, else he would surely have commented on the rulings in *Ram Sahye* v. *Lalla Laljee Sahye* (1) and *Ram Soondur* v. *Ram Sahye Bhagat* (2) instead of relying on them as he does in section 484 at page 664 note (*c*). He does not hesitate to express his opinion when he defers: (*cf.* his doubt in paragraph 594 at page 806) as to correctness of the view taken in *Murarji Gokuldas* v. *Parvatibai* (8) that madness must be congenital to disqualify.

There are also numerous cases cited in West and Buller, 3rd Edition, Volume I, where the Shastris consulted apply these rules as to disqualification to members of a joint family, see Chapter VI, section 1, Q. 1, pages 575, 576 ; Q. 2, page 577 ; Q. 4, page 578 ; Q. 5, pages 578, 579; Q. 6, page 579 ; Q. 7, page 580 : section 36, Q. 3, page 587, (*cf.* if one of his sons is insane.....he cannot be allowed a share of his father's property, but a maintenance only). The view I take appears, therefore, to be consistent with this practice, as evidenced by such cases.

In this particular case the plaintiff was admittedly insane when his father died, and must, I think, be therefore excluded from any partition in the joint estate in accordance with the *Mitakshara*, Chapter 1, section XI, verses 1 and 5. The succession as contemplated in Chapter I, section III, opened up then, and he is still a lunatic when the partition is proposed to be made (verse 6).

The view which is taken in certain *obiter dicta* in *Murarji Gokuldas* v. *Parvatibai* (8), the madness to be a disqualification should be congenital is dissented from in *Ram Sahye* v. *Lalla Laljee Sahye* (1), and also, as already mentioned, in Mayne's Hindu Law. The word 'born' does not appear before the word 'madman' in the *Mitakshara* and the principle on which disqualification is based, *viz.*, the inability to perform sacrifices, applies equally to cases other than congenital. I do not think, therefore, there is any sufficient ground for adopting the view taken in the Bombay case. For these reasons I agree with the conclusion of the Subordinate Judge that plaintiff's suit fails, and would dismiss the appeal with costs.

The case will be referred to a third Judge in accordance with the proviso to section 9 B of Bombay Act XII of 1866.

PRATT, J. C.—(*October 23rd*, 1914.)—This suit is for partition of joint family property.

The plaintiff had become insane six years before the suit, which was instituted by his wife as his next friend.

The questions for decision are

(1) Whether plaintiff's interest was divested by his supervening lunacy.

(2) Whether he has the right to sue for partition.

The *Mitakshara* is the paramount Hindu Law authority in this Province and the subject of disqualification is dealt with in Chapter II, section X. That section is headed "an exclusion from inheritance" and the first verse is as follows :—

The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the re-united parcener.

"An impotent person, an outcaste, and his issue, one lame, a madman, an idiot, a blindman, and a person afflicted with an incurable disease, as well as others (similarly

(7) 22 C. 864.
(8) 1 B. 177.

disqualified) must be maintained; excluding them, however, from participation."

The 5th verse declares that those who are disqualified are entitled to maintenance ; and the 6th verse states a proviso to the rule in verse 1 in the following terms :—

They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs is not deprived of his allotment.

Mr. Rupchand's argument is that the term "succession" in the first verse refers to succession by inheritance properly so called and not to succession by survivorship ; to support this argument he explains the mention of the son and the re-united co-parcener as having reference to self-acquired property only.

I think this is the true construction of the verse. The re-united co-parcener in the case discussed in Chapter II, section IX, and the succession described in that section is confined to the separate property of the deceased. It lays down in verse 7 the curious rule that a re-united brother of the half blood takes equally with a divided brother of the full blood. This must refer to self-acquired property; for the re-united half brother would take all the joint property by survivorship. Again, the succession of the son and of the widow is described in Chapter I, section III, and Chapter I, section VII, as a share in a partition, which clearly implies that the heritage was not co-parcenary property for such property passes without a division. The other 'heirs' are also discussed in the preceding part of the work in the order of succession according to heirship.

On the other hand, there is no doubt that the word "inheritance" in the heading to the section has a much wider significance. In Chapter I, section 1, verse 3, it is said heritage passes in two ways (*a*) unobstructed by right of birth and (*b*) obstructed on the death of the last holder. The second is the case of heirship and it is termed partition, for the estate passes as tenancy-in-common to co-heirs whose succession involves the idea of a division of interest. But the unobstructed heritage is primarily denominated inheritance, see Chapter I, section 1, verse 13, and the property vests at birth—Chapter 1, section 1, verse 27.

The conclusion seems to be that the disqualifications apply not only in cases of obstructed, but to cases of unobstructed, heritage and this inference seems to be supported by the very comprehensive language used is verse 5. Now the proviso made in verse 6 can only refer to the case of obstructed heritage, for that is implied in the words "division of the property." There is no division in the case of unobstructed heritage. This proviso, therefore, enacts that in the case of inheritance by heirship the disability must exist at the time the inheritance opens out. This has been assumed to be so by the Privy Council in *Bodhnarain Singh* v. *Omrao Singh* (9), and there are express decisions to that effect in *Wooma Pershad Roy* v. *Grish Chunder* (10) and *Deo Kishen* v. *Budh Prakash* (5).

In some cases the disabilities are expressed to be from birth, but thatmakes no difference to the application of the rule. For instance if a blind man claimed to succeed as heir the question would be, was he at the time the inheritance opened out congenitally blind?

It now remains to consider when the disability operates in the case of unobstructed heritage. It is important to bear in mind that there is no such thing as succession by survivorship in Hindu Law. Mr. Mayne explains this in section 270 of his work. "But although the fact that *A* is the child of *B* introduces him into the family, it does not give him any definite share of the property, for *B* himself has none. Nor upon the death of *B* does he succeed to anything, for *B* has left nothing behind to succeed to. *B* in fact succeeds to the heritage at the time of his birth." Therefore, if the disabilities apply, as I think they do, to the case of joint family property, they must apply at the time of birth—for that is the time when the rights would accrue if there were no disability. To hold otherwise would necessitate the divestment of rights already vested, and that is contrary to the general rule of Hindu Law. *Moniram Kolita* v. *Keri Kolitani*(11). There is a text in the Smriti Chandrika which conflicts with this construction. In Chapter V, verse 2, it is said that "it is thereby to be supposed that the impotent

(9) 13 M. I. A. 519; 6 B. L. R. 509; 15 W. R. (P. C.) 1; 2 Sar. P. C. J. 607; 20 E. R. 645.

(10) 10 C. 639.

(11) 5 C. 776 at p. 788; 6 C. L. R. 322; 7 I. A. 115; 4 Sar. P. C. J. 103; 3 Suth. P. C. J. 765; 4 Ind. Jur. 363; 3 Shome L. R. 198.

and others would be entitled to inheritance if a partition were made during the life-time of the father." Smriti Chandrika is no authority here, but this commentary may be explained by the fact that the rights of the son to a partition are much more limited in that work than in the *Mitakshara*. See for example Chapter I, verse 26.

In some of the minor commentaries there are passages which imply that the vested right of a co-parcener may be divested for sin, subject to expiation. But these were merely doctrines profitable to the Brahmins, and not part of the present Hindu Law.

In the case of *Ram Sahye Bhakkat* v. *Lalla Laljee Sahye* (1) the lunacy had supervened since the birth of the plaintiff. The Calcutta High Court held that a right to the property was vested in him, but that he could not assert that right by a suit for partition. This seems to me to be a misconstruction of the Hindu Law. The *Mitakshara* denies the right to claim partition because a lunatic has no right to a share. But where there is a right to a share, the right to partition must follow as a logical consequence of the co-ownership. I fully concur in Mr. Justice Prinsep's adverse comment on this case in *Abilakh Bhagat* v. *Bhekhi Mahto* (7).

I, therefore, decide that plaintiff was not divested of his right to the joint family property by his subsequent lunacy and that he has a right to sue for partition. I reverse the decree of the lower Court and remand the suit for trial on the merits. Costs to be costs in the cause.

Decree reversed; Suit remanded.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 412 OF 1913.

January 4, 1915.

Present:—Mr. Justice Sadasiva Aiyar.

MUTHUKARUPPA KONE AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

VEERABHADRA KONE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration—Award, suit on—Failure to file award in Court within 6 months, whether bars suit—Award, whether in nature of foreign judgment—Punchayatdars, *if entitled to administer to witness any reasonable form of oath agreed upon by parties—Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Limitation Act (IX of 1908), Sch. I, Art. 178.*

A suit lies on an award, even though the same has not been filed in Court under paragraph 20, Schedule II, Civil Procedure Code, 1908, within six months, as required by Article 178, Schedule I, Limitation Act, 1908. [p. 50, col. 1.]

Rani Bhagoti v. *Rani Chandan*, 11 C. 386; 12 I. A. 67; 4 Sar. P. C. J. 624; 9 Ind. Jur. 320 and *Ghulam Khan* v. *Muhammad Hassan*, 29 C. 167; 12 M. L. J. 77; 29 I. A. 51 (P. C.); 6 C. W. N. 226; 4 Bom. L. R. 161; 25 P. R. 1902, followed.

An award is not in the nature of a foreign judgment and a Court is, therefore, entitled to go into the merits of the same. [p. 50, col. 1.]

There is nothing illegal in the parties to an arbitration agreeing before *punchayatdars* to have evidence taken after the administration of any reasonable form of oath to the witnesses. [p. 50, col. 1.]

Bhagirath v. *Ram Ghulam*, 4 A. 283; A. W. N. (1882) 34, followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Paramakudi, in Small Cause Suit No. 33 of 1913.

FACTS.—The suit was upon an award. The defences to the suit were that it was barred, as the award had not been filed in Court within six months and that the award itself was vitiated by the misconduct of the arbitrators and also by the procedure followed by the *punchayatdars* in administering a novel form of oath to the witnesses. The District Munsif did not frame any issue as regards the misconduct set up, but found the other two points against the plaintiff and dismissed the suit. The plaintiffs thereupon preferred this Civil Revision Petition.

Messrs. *K. Bhashyam Iyengar* and *K. Rajah Iyer*, for the Petitioners:—The District Munsif erred in law in not raising the most material issue in the case. A suit lies on an award though the same has not been filed in Court: *Rani Bhagoti* v. *Rani Chandan* (1) and *Ghulam Khan* v. *Muhammad Hassan* (2). The District Munsif erred in going into the merits of the award, as it was not in the nature of a foreign judgment. It is competent to the *punchayatdars* to administer to the witnesses any form of oath which may be agreed upon by the parties, *Bhagirath* v. *Ram Ghulam* (3)

(1) 11 C. 386; 12 I. A. 67; 4 Sar. P. C. J. 624; 9 Ind. Jur. 320.

(2) 29 C. 167; 12 M. L. J. 77; 29 I. A. 51 (P. C.); 6 C. W. N. 226; 4 Bom. L. R. 161; 25 P. R. 1902.

(3) 4 A. 283; A. W. N. (1882) 34.

SAHDEO GIR *v.* DEO DUTT MISIR.

Mr. *K. V. Krishnaswami Iyer*, for the Respondents:—The District Munsif did consider the question of misconduct. *Vide* his finding that the statement in the award that the defendants did not appear on 22nd December 1911 at Nayinar Koil, was not true. It must, therefore, be taken that he does not find any misconduct in the arbitrators. The award not having been filed in Court within six months the suit is barred. The District Munsif is clearly right in his view that an award is in the nature of a foreign judgment. Arbitrators have no power to administer any form of oath they please.

JUDGMENT.—I am satisfied on a perusal of the 6th paragraph of the plaint and the recital in the plaint about the date of the cause of action that this suit is based on the award (Exhibit E).

The learned District Munsif did not raise the most material issue in such a case, namely, whether the award was invalid owing to the misconduct of the arbitrators. He raised three other questions and fell into two serious errors in deciding those questions. He held that the suit was barred by limitation because no application was made within six months of the award to have it filed in Court. A suit lies on an award even though it has not been filed in Court [See *Rani Bhagoti* v. *Rani Chandan* (1) and *Ghulam Khan* v. *Muhammad Hassan* (2)].

The learned Munsif further held that the award was in the nature of a judgment of a foreign Court and he was, therefore, entitled to go into the merits of the award. He was clearly in error in that point also.

Following *Bhagirath* v. *Ram Ghulam* (3), I hold that there is nothing illegal in parties agreeing before *punchayatdars* to have evidence taken after the administration of any reasonable form of oath to witnesses.

There is, no doubt, a finding by the Munsif that a statement in the award of the arbitrators, that the defendants did not appear at Nayinar Koil on 22nd December 1911 to take the oath as agreed upon by the defendants, did not represent the true state of facts. But I am unable to accept the finding as a satisfactory one and the District Munsif does not find that the arbitrators, in making that statement and acting upon the footing that the facts were as found in that statement, were guilty of misconduct.

In the result, I set aside the judgment and decree of the District Munsif and remand the suit to him for disposal *de novo*, after raising and deciding the question whether the arbitrators' award was invalid owing to their misconduct and also with reference to the above observations.

Costs will abide the result.

Petition allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 114 OF 1914.

March 9, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

SAHDEO GIR—APPLICANT—PETITIONER

versus

DEO DUTT MISIR AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 152—Error—Accidental slip—Jurisdiction—Refusal of Court to correct mistake—Revision.

In a suit for sale on the basis of a mortgage one of the defendants pleaded that he was a prior mortgagee. An issue was struck to that effect and was decided in favour of the defendant. In the operative part of the judgment, however, no mention was made as to the priority of the defendant's claim, and accordingly there was no mention of it in the decree. After the time for appeal had expired, an application was made for amendment of the decree under section 152 of the Code of Civil Procedure. The Court refused to go into its merits, holding that section 152 did not apply:

Held, that this was a clear case of an error arising from an accidental slip or omission and as the Court below had refused to correct the error, the High Court could interfere in revision. [p. 51, col. 1.]

Civil revision against an order of the Subordinate Judge of Gorakhpur.

Mr. *Sital Prasad Ghose* (with him Mr. *J. N. Chaudhri*), for the Applicant.

The Hon'ble Mr. *Abdul Raoof*, for the Opposite Party.

JUDGMENT.—This is an application in revision brought under peculiar circumstances. The petitioner was a prior mortgagee. He had brought a suit against the mortgagor and the subsequent mortgagees upon his mortgage and had obtained a decree. Later on the subsequent mortgagees brought a suit impleading the mortgagor and the

present petitioner, and asked for a decree for sale. The petitioner pleaded his prior mortgage. An issue was expressly struck on the point and was found in the petitioner's favour. The operative portion of the judgment directed that a decree for sale should be prepared in accordance with the provisions of Order XXXIV, rule 4, of the Code of Civil Procedure, allowing six months for payment. In the absence of any express direction in the judgment that this decree was to be for sale of the property in suit subject to the petitioner's prior mortgage, no order to that effect was embodied in the decree. The decree passed was, therefore, one for sale of the property as it stood, without reference to the petitioner's prior mortgage. That decree was not appealed against, and to this extent the petitioner may have been guilty of laches. When, however, it came to the petitioner's knowledge that the opposite party was seeking to execute that decree as it stood, he went to the Court which passed the same and sought to obtain its amendment. The application with which we are concerned was one presented under section 152 of the Code of Civil Procedure. The Court below refused to go into the matter on the merits. It held that the case was not one to which the provisions of section 152 aforesaid applied. We are unable to concur in the reasoning of the learned Judge of the Court below. In our opinion, this was a clear case of an error arising from an accidental slip or ommission. The Court should have been prepared to correct that error, either of its own motion or on the application of any of the parties. There has been a refusal to exercise what in this case was a necessary jurisdiction, and this refusal is based on a misunderstanding of the powers conferred on the Court below by the section aforesaid. We accept this application, and direct that the judgment be amended by the insertion of the express words directing the sale of the property in suit subject to the prior mortgage of this petitioner, and that consequential amendments be made in the preliminary decree for sale, as also in the decree absolute. As we think that the petitioner might have been more watchful over his own interests and should have taken action earlier than he did, we direct that he do bear the costs of the opposite side in the present proceedings both here and in the Court below.

Application granted.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 42 OF 1912.

November 20, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

H. H. SIR *Aha* SULTAN MUHAMMAD—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Waste land—Title—Evidence—Possession—Quantum of evidence necessary—Bombay Land Revenue Code (Bom. Act V of 1879), s. 37—Open village sites, title of Government—Presumption.

Section 37 of the Land Revenue Code does not confer title on Government and there is no presumption of title in favour of Government even as to open village sites. [p. 52, col. 1.]

Hanmantrao v. *The Secretary of State*, 25 B. 287; 2 Bom. L. R. 1111, followed

Where there is already title in one party, the law is slow to infer that the physical acts of user were done with the intention of defeating that title or of laying claim to land already vested in another, but the same acts of user which do not suffice as evidence of actual possession might be adequate proof of possession when the title to the land is in doubt. [p. 52, cols. 1 & 2.]

In such cases the quantum of evidence depends upon the character of the land and although in the case of waste lands, the Court would seize upon the slightest evidence of occupation, the occupation or the acts of user must be such as to indicate the intention to hold for oneself, for without such intention there is no possession. [p 52, col. 2.]

Mahomed Ali Khan v. *Khaja Abdul Gunny*, 9 C. 744 at p. 751; 12 C. L. R. 257: *Musammat Natukhee Koeri* v. *Chintamun Singh Chowdhry*, 20 W. R. 247, followed.

Appeal against the decision of the District Judge, Hyderabad Sind.

Mr. *Mathradas Ramchand*, for the Appellant.

Mr. *E. Raymond* (Government Pleader), for the Respondent.

JUDGMENT.—The plaintiff sues to recover possession of a plot of land and a platform, alleging dispossession by the Collector in 1907.

The lower Court found that there was no direct evidence of title; that plaintiff had

proved possession of the platform and that the acts of user of the open site did not amount to evidence of possession. That Court, therefore, dismissed the suit as regards the open site, but restored plaintiff's possession of the platform.

The plaintiff appeals as to the open site and the defendant has filed cross-objections claiming the platform.

I think that the District Judge has come to a correct conclusion, although he was wrong in applying to the evidence the principle enunciated in the case of *Framji* v. *Goculdas* (1). There is no question here of adverse possession, for it is well settled that section 37 of the Land Revenue Code does not confer title on Government and that even as to open village sites there is no presumption of title in favour of Government —see the judgment of Jenkins, C. J., in *Hanmantrao* v. *The Secretary of State* (2).

There being no direct evidence of title or presumption of title on either side, the case has to be decided on the presumption of ownership arising from possession.

Now possession is the physical act of user coupled with the intention to hold as owner—where there is already title in one party, the law is slow to infer that the physical acts of user were done with the intention of defeating that title or of laying claim to land already vested in another. Mere casual acts of intrusion will not, therefore, be considered evidence of possession or as inconsistent with the title of the rightful owner. So in *Framji* v. *Goculdas* (1), it was said that "such user excites no particular attention", such temporary accommodation would not necessarily mean or be understood to mean a claim to the ownership of land and that "such acts of user are never construed as founding a claim to the land by adverse possession". But in that same judgment Sargent, C. J., was careful to limit these observations to *adverse possession*. He said that "it was important to bear in mind that the original title to the land was clear, for the acts of user, which were relied upon, might have been important evidence as to title if that was a matter upon which there was any doubt." It is clear, therefore, that the same acts of user which do not suffice as evidence of adverse possession might be adequate proof of possession when the title to the land was in doubt. For when that is the case, the law is not inclined to presume that the act of user was without the intention of holding the land.

In such cases the quantum of evidence must depend upon the character of the land, for, as said in *Mahomed Ali Khan* v. *Khaja Abdul Gunny* (3), land is often either partly or temporarily capable of actual enjoyment in any of the customary modes, as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an innundation; it may produce some profit, but trifling in amount and only of occasional occurrence, as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field.

And again in *Musammat Natukhee Koeri* v. *Chintamun Singh Chowdhry* (4), Phear, J., said that in the case of waste land the Court would seize upon the slightest evidence of occupation. But on the other hand, the occupation or the acts of user must be such as to indicate the "*animus sibi nahendi*" the intention to hold for oneself, for without such intention there is no possession.

Applying these principles to the present case it is clear that as to the land covered by the platform plaintiff has proved possession. It is a permanent structure erected by the plaintiff and kept in repair by him—and he must have done so with the intention of holding the land it occupies for himself. But as to the open site there is no such unambiguous evidence. It is not enclosed by the plaintiff and it is freely used by the villagers going to and from the village well. There is no presumption that plaintiff's possession of the platform implies possession of the open site as well. Possession of a part is sometimes evidence of possession of the whole, but that is only when there is a common character of locality between

(1) 16 B. 338.
(2) 25 B. 287; 2 Bom. L. R. 1111.
(3) 9 C. 744 at P. 751; 12 C. L. R. 257.
(4) 20 W. R. 247.

the two places. See the judgment of *Jones* v. *Williams* (5). The platform is distinct from the open site, for it lies within the frontage of plaintiff's buildings on either side. The question of the open site must, therefore, be decided on the evidence referring to it. There are three terms of evidence. The first is that Mahomedans used to celebrate the *Moharram* on it. This is public user and not indicative in any way of plaintiff's private ownership. Next it is proved that plaintiff has been in the habit of levying a fee from fishermen who sell fish on this site. But plaintiff's agent had admitted that the fee was merely a clearance charge, *i. e.*, not rent but compensation for the nuisance caused. This is an important admission, for it shows that at the time it was made there was no idea of asserting title to the land. Lastly, it is shown that the produce of three trees on the land has been taken by the plaintiff. The trees are not valuable trees. Nor is it shown that the plaintiff exclusively took the produce or that he had taken any precaution to protect the trees. The trees are a *nim* tree and two *babul* trees and the gum from them has yielded five rupees in 34 years. This is so insignificant that it seems probable that the gum could have been had by anybody for the trouble of picking, for the whole village has access to the land and to the trees. If this gum had been collected by virtue of a right of ownership, the plaintiff's agent would not have failed to assert the ownership when justifying to the *mukhtiarkars* the levy of the fee for selling fish. We, therefore, agree with the District Judge that the acts of user on the open site are not evidence of possession. The District Judge should not, however, have allowed mesne profits for the platform when he found that the fees levied were not in the nature of rent.

We vary the decree of the District Judge by disallowing mesne profits. The decree is otherwise confirmed. Parties to bear their own costs.

Decree modified.

(5) 8 M. & W. 349; 9 D. P. C. 702; 10 L. J. Ex. 253; 5 Jur. 895.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 135 OF 1914.

March 8, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

MAHARAJ NARAIN SHEOPURI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SHASHI SHEKHARESHWAR ROY—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 9—Specific Relief Act (I of 1872), s. 42—Suit for declaration to post of Honorary Secretaryship to an association, maintainability of.

Where the plaintiff sues for a declaration that he is the Honorary Secretary to an association and that a resolution passed at a meeting of the association dismissing him from the secretaryship is null and void:

Held, that he is bound to satisfy the Court that the suit is one concerning the right to an office within the meaning of section 9 of the Civil Procedure Code, and also that what he is enforcing in the suit is his right to a certain 'legal character' within the meaning of section 42 of the Specific Relief Act. [p. 54, col. 1.]

Channu Dat Vyas v. *Babu Nandan*, 6 Ind. Cas. 223; 9 A. L. J. 529; 32 A. 527, referred to.

Where the plaintiff's services to an association are voluntary and gratuitous and where there is no question of any contract between him and its Board of Trustees, the Civil Court has no jurisdiction to entertain the suit. [p. 54, col. 1.]

First appeal from an order of the District Judge of Benares.

Mr. *S. C. Chowdhri* (for Dr. *S. C. Banerji*), for the Appellants.

Mr. *A. E. Ryves*, (with him Messrs. *Harendra Krishna Mukerji* and *A. C. Mitra*), for the Respondent.

JUDGMENT.—In this case the plaintiff, Raja Sashi Sekareshwar Roy, Rai Bahadur, describes himself as the Chief Secretary of the Board of Trustees, otherwise known as the Pratinidhi Sabha, of an Association known as the Sri Bharat Dharma Mahamandal, registered under Act XXI of 1860. He complains in effect that the two defendants, who are members of the same Association, are seeking to remove him from the post of Chief Secretary and have endeavoured to do so by measures contrary to the rules of the Association itself. He asks for a declaration that a circular convening a meeting to be held on May 12th, 1912, was "invalid and inoperative under the rules or constitution of the said Sri Bharat Dharma Mahamandal," and that the meeting held in consequence of this notice

and the resolutions passed at the said meeting are "null and void."

The first Court held that the dispute was not one cognizable by the Civil Courts and that the plaintiff had no *locus standi* under section 42 of the Specific Relief Act to ask for a declaration: it dismissed the suit accordingly. The learned District Judge in appeal has reversed this finding and remanded the suit for trial on the merits. The appeal before us is by the defendants against this order of remand.

I think the first Court was substantially right and that the learned District Judge has taken too narrow a view of the question in issue. In order to succeed, the plaintiff has to satisfy the Court both that the suit is one concerning the right to an office, within the meaning of section 9 of the Code of Civil Procedure, and also that what he is enforcing in this suit is his right to a certain "legal character" within the meaning of section 42 of the Specific Relief Act (No. 1 of 1877). Of the reported cases to which we were referred in argument, the one most nearly in point is that of *Channu Dat Vyas* v. *Babu Nandan* (1). It may be that the fact that a plaintiff is claiming some position to which no remuneration attaches is not always decisive; but in the present case I think it is so. If the plaintiff were the paid Secretary of the Board of Trustees he would have certain rights founded upon contract, and he could claim the enforcement of the rules of the Society or Association as they existed at the time of his appointment, in so far as those rules formed part of the essential conditions subject to which he accepted his employment. As a matter of fact the plaintiff's services are voluntary and gratuitous; there is no question of any contract between him and the Board of Trustees. The latter have a perfect right to entrust the duties of Honorary Secretary to their body to such person or persons, willing to undertake the same, as they may from time to time approve. It would be idle for the Civil Courts to enter upon an investigation of the rules of this particular Association governing the appointment of Honorary Secretaries, when those rules themselves could be altered at any moment by the Board of Trustees, and there is no enforceable contract in existence which could bind the Trustees to abide by the rules in existence at the time of the plaintiff's appointment in their subsequent dealings with him. That this is no merely conjectural argument is sufficiently shown by the fact that, at the hearing of this appeal, we have been handed two different sets of rules, the appellant putting in a book dated "January 1911" and the respondents one of 1913. The point really lies in a nutshell. The plaintiff either does or does not possess the confidence and support of a majority of the Board of Trustees. In the former case no such machinations as are alleged in the plaint could prevent the said Board from continuing to use his services as their Honorary Secretary, in the latter case no decree which any Civil Court could pass on a suit like the present could prevent the Board of Trustees from dispensing with the plaintiff's services and employing some one else.

I would set aside the order of the lower Appellate Court and restore the decree of the Court of first instance dismissing this suit.

CHAMIER, J.—I agree.

BY THE COURT.—The order and decree of the lower Appellate Court are set aside and the decree of the Court of first instance dismissing the suit is restored. The defendants will get their costs in all Courts.

Appeal allowed.

(1) 6 Ind. Cas. 223; 9 A. L. J. 529; 32 A. 527.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 113 OF 1913.

March 10, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

PANDA PATYYA—PLAINTIFF—APPELLANT

versus

PANDA VENKAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Adoption with consent of reversioner, if invalid for want of authority - Authority, when can be presumed—Illatom *adoption—Quantum of proof—Charge created by widow—Necessity—Burden of proof—Nature of evidence.*

An adoption made by a Hindu widow with the consent of the nearest reversioner is not bad for want of authority. [p. 56, col. 1.]

PANDA PATYYA *v.* PANDA VENKAMMA.

In the absence of anything to show that a reversioner was actuated by any representation of a widow that her husband had given her authority to adopt, a Court is entitled to presume that the reversioner, in giving his son to be adopted by the widow, was fully conscious of what he was doing and was mindful of all those considerations which he, as a reversioner, ought to take into account in such circumstances. [p. 56, col. 1.]

The claim that a person has been taken as *illatom* son-in-law must be proved by very reliable evidence. [p. 56, col. 2.]

The onus of proving that a charge created by a Hindu widow is binding on the reversioners lies very heavily upon the persons who claim the benefit of the transaction. [p. 57, col. 2.]

Where the only evidence let in as to the existence of necessity was that a series of documents executed by a widow and an alleged *illatom* son-in-law (which *illatom*, however, was found against) were attested by the reversioners and that the widow had been maintaining in her house a large number of persons related to her but not belonging to her husband's family:

Held, that the evidence was insufficient to prove the existence of necessity and that the onus was not discharged. [p. 57, cols. 1 & 2.]

Hari Kishen Bhagat v. *Kashi Pershad Singh*, 28 Ind. Cas. 674; 19 C. W. N 370; 13 A. L. J. 223; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; 2 L. W. 219 at p. 222; 17 M. L. T. 115, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur, in Original Suit No. 57 of 1910.

FACTS.—One Venkatadri died leaving behind him a widow Ademma and an adopted son Venkataramayya. Subsequently Venkataramayya died. Ademma then adopted one Rangayya, the brother of Venkataramayya, with the consent of his natural father Lakshminarasu, the then nearest reversioner to the estate. Rangayya also died, leaving a widow Venkamma. The latter and one Pichayya (who set up an *illatom* affiliation by his father-in-law Venkatadri during his life-time) together borrowed for meeting the expenses of maintaining a number of relations of the widow Venkamma and executed documents therefor which were attested by the plaintiff and his co-reversioner (his deceased brother). Ademma died in 1892 and in 1894 Venkamma released all her rights in favour of Pichayya. Some of the properties belonging to the estate having been brought to sale in respect of the debts above mentioned and having been purchased by the 3rd defendant, the plaintiff in 1908 instituted the present suit for a declaration that the sale was not binding on his reversionary right. The Temporary Subordinate Judge of Guntur dismissed the suit, holding that though the adoption was made with the consent it was still invalid for want of the authority of the nearest reversioner, that Pichayya had not been affiliated as *illatom* son-in-law, and that the suit was barred as it was not brought within 12 years of the death of Ademma. The plaintiff then appealed to the High Court.

Mr. *T. Prakasam*, for the Appellant:—The Sub-Judge erred in dismissing the suit. There is no authority for the position that when there is consent of the reversioner, authority also is necessary. In this case the boy adopted being the son of the nearest reversioner and there being nothing to show that he was induced to consent to the adoption by any representation by the widow as to the existence of any authority from her husband, the Courts ought to presume that the reversioner, after fully considering whether an adoption was necessary, consented to give his son in adoption. The plaintiff is entitled to the declaration prayed for. Attestation of the documents did not disentitle him to relief. *Vide* the observations of their Lordships of the Judicial Committee of the Privy Council in *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1). The onus of proving necessity, which lay very heavily upon the purchaser, had not been discharged.

Mr. *P. Nagabhushanam*, for the Respondents:—There is nothing to show that Lakshminarasu, when giving the son in adoption, had present in his mind the various considerations which ought to influence a reversioner when authorising an adoption by a widow. Merely giving his son in adoption would not, by itself, be sufficient to prove that the consent was a considered consent or that the adoption was authorised. In fact no adoption took place. What seems to have happened was that after Venkataramayya's death, Ademma pased off Rangayya, who had married her grand-daughter, as an adopted son Pichayya had been adopted as *illatom* son in-law. In any event the suit, having been brought more than 12 years after the death of Ademma, is barred. The debts having been incurred for necessity, the sale is

(1) 28 Ind. Cas. 674; 19 C. W. N. 570; 13 A. L. J. 223; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; 2 L. W. 219 at p. 222; 17 M. L. T. 115.

binding upon the reversioner and the plaintiff is not entitled to the declaration sued for.

JUDGMENT.—This is a suit brought by the plaintiff to declare that the sale of the properties, items Nos. 1 to 23 in the Schedule to the plaint, to the 3rd defendant, in execution of the decree in Original Suit No. 329 of 1893 of the Court of the District Munsif of Ongole against one Venkamma, the widow of one Rangayya, is not binding on the plaintiff's reversionary right to these properties. The suit is on the footing that Rangayya was adopted by Ademma, the widow of one Venkatadri, after the death of Venkatadri and of Venkataramayya, Rangayya's brother, whom Venkatadri had himself adopted during his life-time. Venkataramayya died after Venkatadri; and according to the evidence for the plaintiff Lakshminarasu, Rangayya's father, being then the next reversioner and there being no other reversioner in the same degree, gave his son Rangayya in adoption to the widow. The Subordinate Judge has found among other things that this adoption was bad for want of authority, although it was made with the consent of the nearest reversioner. We are unable to agree with this. We think that the circumstances indicate, and we are entitled to presume, that in giving his son to the widow the next reversioner was fully conscious of what he was doing and was mindful of all those considerations which a reversioner ought to take into account in such circumstances. It must be borne in mind in this case that there is no question that he was in any way actuated by any representation by the widow that her husband had given her authority to adopt. It was not suggested that her husband had given her any authority, but he had shown his desire that his lineage should be continued by himself adopting a son in his life-time. No authority has been cited to induce us to hold that a consent given in such circumstances is insufficient.

The Subordinate Judge, however, has also held that it is not proved that the adoption took place. On a careful consideration of the evidence we are unable to agree with this conclusion. The adoption is said to have taken place in March 1876, and within the next three years we have three registered documents, Exhibits B, C and H, Exhibits H and C being mortgages and Exhibit B, a sale-deed, in which Rangayya is spoken of as the adopted son of Venkatadri. Some far-fetched suggestion was made that after the death of Venkataramayya, the widow of Venkatadri, because this boy married her grand-daughter, was anxious to pass him off as an adopted boy when he was not one. But this is an explanation which we are unable to accept. The fact that, while he was merely a boy incapable of defending his own interests, we find he was recognized as adopted son, is strong evidence to show that he was such. He died very soon about, June 1881.

Before referring to what followed, it is necessary to deal with the position of the 2nd defendant's husband Pichayya, who, it has also been argued for the defendants, had been taken as an *illatom* son-in-law by Venkatadri at the same time that he adopted Venkataramayya. The Subordinate Judge has disbelieved the three witnesses who purported to speak to this taking in *illatom* by Venkatadri in his life-time, and we are unable to say that he was wrong in this conclusion It is very easy for men who have married into a family to set up a claim to a share of the family property on the footing that they have been taken as *illatom* son-in law; but such contentions require to be proved by very reliable evidence, as they are claims which is very easy to set up and which apparently there is a great temptation to set up. Now, after the death of Venkatadri, there are three documents, Exhibits XXII, XX (*b*) and XX (*c*), on which the defendants rely, as negativing the adoption of Rangayya and also as supporting the *illatom* claim of Pichayya. After Venkatadri's death Pichayya in 1876 and 1877 got three unregistered bonds, Exhibits XXII, XX (*b*) and XX (*c*), executed in his favour for a balance of indebtedness due to Venkatadri. How he got them is not shown. It may be that he induced some of these debtors to give them to him with a view of his making them evidence in support of his claim to be an *illatom* son-in-law.

To go back now to what happened after the death of Rangayya when the lst defendant, his widow, became entitled to the estate if he were really the adopted son of Venkatadri, we find a series of documents, Exhibits XIX, XIX (*a*), XIX (*b*) and XX, one of them a mortgage and the others simple

bonds, and then we have another series of documents, Exhibits V, III, IV, XXII, XVIII and I, between January 1887 and December 1892, documents executed by Venkamma, the widow of Rangayya, and Pichayya, without saying in what character they executed those documents. It seems to us that those documents afford some recognition of the widow's right, though at the same time they show that Pichayya was seeking to set up his *illatom* right, but if the adoption had not been notorious, it is not likely that he would have brought in Venkamma at all. Then we come to Exhibit A of the 3rd December 1894. That is a document executed by Venkamma in favour of Pichayya, in which she distinctly states that she was the widow of Rangayya, who had been adopted by Venkatadri. It looks as if at this time the widow had come entirely under the influence of Pichayya and she purports to recognise the *illatom* sonship and to renounce all her rights in the property in his favour. The various documents executed by Venkamma and Pichayya resulted in two decrees which were obtained against them both in two suits of 1893, and it was when those decrees were sought to be executed, that the plaintiff, the alleged next reversioner, filed his suit in 1905. That suit was held to be premature on the ground that there was no cause of action. Subsequently some of the properties belonging to the estate were attached and sold in execution of these decrees and that gave the plaintiff his cause of action, to sue for a declaration that those sales are not binding on the properties beyond the life-time of the widow. If there had been no adoption of Rangayya, then the estate would have devolved on Ademma, the widow of Venkatadri, who died in 1892, and as the suit was not brought till 1908, it would have been barred. It is not contended, however, that if the adoption was valid a suit like this would be barred in the life-time of the 1st defendant, the widow of the last male owner.

Then the next question is whether the plaintiff is entitled to the declaration asked for. It has been authoritatively laid down quite recently by the Privy Council that "to be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow, or an alienation effected by her, can be supported only by proof *aliunde* that such debt was contracted, or alienation was made, for valid and legal necessity and the onus of establishing such necessity rests heavily on the person who claims the benefit of transactions with a Hindu widow or other females taking similar estates". *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1). Applying that law to the circumstances of this case we are unable to agree with the Subordinate Judge that that onus had been discharged. All we have really is a series of documents executed by this woman Venkamma and Pichayya and two further facts are relied on to show that there was necessity: one that she maintained in her house a large number of persons related to her but not belonging to her husband's family, for whose support she was obliged to run into debt: and the other is that most of these documents by which money was raised were attested either by the plaintiff or his deceased brother, who at that time was co-reversioner. In this very case, *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (1), which I have just cited, their Lordships of the Privy Council have emphatically pointed out that great care must be used in drawing inference of consent to alienations of a widow from the fact that the reversioners attested the documents executed by her, because that is perfectly consistent with an expectation that those documents should only bind the widow's estate. Beyond this no attempt has been made to show that these debts were incurred for any necessary purpose and we must hold that the defendants have failed to establish the burden which is upon them, and we must reverse the decree of the lower Court and decree the suit with costs throughout.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 38 OF 1912.

November 23, 1914.

Present:—Mr. Pratt, J. C. and Mr. Crouch, A. J. C.

HARUN KHAN RAHIM KHAN—APPELLANT

versus

TEJUMAL PARIOMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 54—Execution referred to Collector Application to Civil Court to expedite execution, whether execution application—Power of Court to control Collector's proceedings.

An application to a Civil Court to expedite and authorize the Collector to revive and continue old execution proceedings referred to him for execution by that Court and still pending before him, is not an application for execution and the bar of limitation does not apply to it.

Qamar-ud-din Ahmed v. *Jawahir Lal*, 27 A. 334; 1 C. L. J. 381; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433; 32 I. A 102, followed.

A Civil Court is competent to entertain such an application as it has a right of control over the Collector's proceedings in execution.

Purushottam Bhaskar v. *Balkrishna Pandurang*, 28 B. 238; 5 Bom. L. R. 949, followed.

Appeal against an order of the District Judge, Sukkur.

Mr. *Gulabrai Nihalchand*, for the Appellant.

Mr. *Mulchand Maganlal*, for the Respondents.

JUDGMENT.—A decree for partition was made between the appellant and the respondents on the 26th March 1895.

On the respondent's application for execution of the 14th October 1898, an order granting execution was made and referred to the Collector under section 265 of the Code of 1882, as the estate was one assessed for payment of revenue to Government.

On the 26th November 1909, one of the respondents made a petition to the Court stating that he had learned that the Collector had lost the papers and asking the Court to make "*bundobust*" in the matter.

The Court ordered fresh warrant to be sent to the Collector for execution.

It is against this order that the appellant comes to us in second appeal.

If by the words 'fresh warrant' the Court intended to order fresh execution proceedings the order was without jurisdiction, for the Court cannot order execution except on an application for execution, and the petition of the 26th November 1909 was in no sense an application for execution. It merely prayed that the Collector should be expedited with reference to his proceedings on the pending execution application.

Mr. Mulchand seeks to support the order by urging that under the present Code the decree for partition must be treated as a preliminary decree; that the proceedings before the Collector are merely a continuation of the suit leading up to the final decree and that the Sub-Judge could, therefore, make the order irrespective of an execution application. But Order XX, rule 18, makes it clear that a preliminary decree for partition is only made under the second clause of the rule, when the property to be partitioned is not property assessed to Government revenue. In a case where the execution is worked out by the Collector the Court makes final decree, and the rest of the proceeding is worked out in execution as under the procedure of the old Code. This is also apparent from section 54 of the Code which occurs in part II relating to execution.

It seems to us, however, that the real intention of the Sub-Judge's order was to give authority to the Collector to revive and continue the old execution proceeding which was still pending before him. The application was, as said by the Privy Council in *Qumar-ud-din Ahmed* v. *Jawahir Lal* (1), "an application to revive and carry through a pending execution suspended by act or default of the decree-holder." The bar of limitation does not apply to such an application and the Sub-Judge is competent to entertain, for he has a right for control over the Collector's proceedings in execution. *Purushottam Bhaskar* v. *Balkrishna Pandurang* (2).

We confirm the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

(1) 27 A. 334; 1 C. L. J. 381; 15 M. L. J. 258; 9 C. W. N. 601; 2 A. L. J. 397; 7 Bom. L. R. 433; 32 I. A. 102.

(2) 28 B. 238; 5 Bom. L. R. 949.

BHOLA NATH *v.* KARTIK PRASAD PANDE.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 132 OF 1914.

December 14, 1914.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

BHOLA NATH—PLAINTIFF—APPELLANT

versus

KARTIK PRASAD PANDE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115, O. XLI, r. 10—Appeal, security for—Notice to show cause—Sufficient cause not shown—Dismissal of appeal on that day—Material irregularity.

Where a notice issued to the appellant to show cause why he should not be required to furnish security before his appeal was heard, does not put the appellant on his guard that the security must be ready in the event of sufficient cause not being shown, the dismissal of the appeal on failure to furnish the security not within a time under ordinary circumtances sufficient for him to furnish is a material irregularity within the meaning of section 115 of the Civil Procedure Code, 1908.

Civil revision against the decree of the Subordinate Judge of Mirzapur, dated the 14th of May 1914.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *W. Wallach*, for the Respondent.

JUDGMENT.—This application for revision arises out of the following facts. An appeal was pending before the Subordinate Judge of Mirzapur in which 15th of May 1914 was fixed for hearing. On the 29th of April 1914, the respondent applied under Order XLI, rule 10, Civil Procedure Code, that the appellant might be ordered to furnish security for the costs of the first Court and of the Appellate Court before the appeal was heard. The Subordinate Judge passed an English order to the effect that notice should go to the appellant to appear before the Court on May the 14th, 1914, and to show cause why he should not be required to furnish security to the amount of Rs. 150 before the appeal was allowed. No sufficient cause being shown, an order was passed requiring security in the sum named to be furnished on the following day. This order was not complied with and the appeal was thereupon dismissed without having been heard on the merits. There had been one irregularity in the proceedings, in that the vernacular notice issued to the appellant was not in accordance with the Judge's English order. It directed the appellant to show cause on May 14th, 1914 why he should not be required to furnish security before the appeal was heard, and not before the appeal was allowed. The apparent object of the Subordinate Judge was that the question of the application by the respondent in the matter of the security should be disposed of in time to ensure the hearing of the appeal on the date fixed, that is to say, on May 15th, 1914. If he had seen fit to issue a notice so worded as to call upon the appellant either to furnish security on the date specified, or to show adequate cause to the contrary, his order would have been unassailable. The notice actually issued, besides being at variance with the Court's English order, did not put the appellant on his guard that the security must be ready in Court in the event of sufficient cause not being shown. In his order disposing of the matter, the learned Subordinate Judge admits that under ordinary circumstances an order giving the appellant, who was a resident of Benares, only one day in which to furnish the required security would not have been a proper order. He assumes, however, that the notice issued by the Court was sufficient to give the appellant warning that he must either come to Court on the 14th May 1914 with his security ready, or must be prepared to show adequate cause against his being required to furnish such security. This contention overlooks the fact that the notice issued by the Court was not calculated to warn the appellant to have his security ready on May the 14th. We think that the proceedings of the Court below were irregular and the irregularity was a material one, the case being a hard one, inasmuch as the appeal was dismissed unheard because of the appellant's failure to comply with an order which, the learned Subordinate Judge himself admits, was not on the face of it an order with which he could reasonably have been expected to comply. We accept this application, set aside the order dismissing the appeal and direct the Subordinate Judge to re-admit the appeal on to his file of pending cases and to give to the appellant reasonable time, not less than one week, within which to comply with the order requiring him to furnish security. The costs of this application will be costs in the suit.

Order of dismissal set aside.

AHMAD SAHIB SHUTARI *v.* MAGNESITE SYNDICATE LTD.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 859 OF 1913.

March 18, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

Syed AHMAD SAHIB SHUTARI—PLAINTIFF—APPELLANT

versus

THE MAGNESITE SYNDICATE, LTD., BY THEIR AGENT AND MANAGER G. TURNER AND OTHERS—DEFENDANTS NOS. 1, 2 AND 4 TO 8—RESPONDENTS.

Ejectment, suit in — Trespass — Tenant-in-common, right of one to sue alone—Civil Procedure Code (Act V of 1908), O. XXVI, r. 9—Personal inspection by Judge, finding based on—Judgment, if valid.

As against a trespasser in possession of immoveable property any one of co-owners or co-tenants can alone maintain an action in ejectment. [p. 60, col. 2.]

Radha Proshad Wasti v *Esuf*, 7 C. 414: 9 C. L. R. 76; *Harendra Narain Singh Chowdhry* v. *Moran*, 15 C. 40; *Hira Lal* v. *Bhairon*, 5 A. 602: A. W. N. (1883) 155 and *Gopalasami* v. *Periasami Tevar*, 6 M. L. J. 27, followed.

Gopal Ram Mohuri v. *Dhakeswar Pershad Narain Singh*, 35 C. 807; 7 C. L. J. 483 and *Pateshri Pratap Narain Singh* v. *Rudra Narain Singh*, 1 A. L. J. 543; A. W. N. (1903) 119; 26 A. 528, referred to.

A judgment solely based on knowledge gained by the Judge during local inspection is illegal. An inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence le in. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. [p. 61, col. 1.]

Second appeal against the decree of the District Court of Salem, in Appeal Suit No. 43 of 1912, preferred against the decree of the Court of the Principal District Munsif of Salem, in Original Suit No. 292 of 1911.

FACTS.—The plaintiff, a tenant-in-common with others of the suit property, sued the 1st defendant, a lessee, in ejectment and for damages, alleging that the latter had trespassed upon the property in suit, which was not included in his lease. The 1st defendant denied the trespass. The District Munsif, however, decreed the suit. On appeal the District Judge dismissed the suit, holding that one co-owner cannot, without joining the other co-owners as parties, sue to eject a trespasser and further basing his judgment on personal knowledge gained in a local inspection made by him. The plaintiff preferred this second appeal.

Mr. *T. Rangachariar*, for the Appellant:—A co-owner is entitled to sue a trespasser in ejectment. *Radha Proshad Wasti* v. *Esuf* (1), *Harendra Narain Singh Chowdhry* v. *Moran* (2), *Hira Lal* v. *Bhairon* (3) and *Gopalasami* v. *Periasami Tevar* (4). See *Pateshri Pratap Narain Singh* v. *Rudra Narain Singh* (5) as to members of a joint Hindu family. Further the District Judge erred in basing his judgment solely upon what he observed at the local inspection. *Kesowji Issur* v. *G. I. P. Railway Company* (6) and *Rai Kishori Ghose* v. *Kumudini Kant Ghose* (7).

Mr. *D. Chamier*, instructed by Messrs *King and Partridge*, for the Respondents:—The appellant is not entitled to sue alone. *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh* (8). It was perfectly competent to the Judge to make a local inspection and give judgment based on the knowledge gained at such inspection. The procedure not having seriously prejudiced the appellant, he is not entitled to any relief on that ground.

JUDGMENT.—In this suit the plaintiff complains that the 1st defendant has trespassed on property not included in the lease, and prays for an injunction and for damages. The trespass was denied. The District Munsif found for the plaintiff and awarded damages.

In appeal, the District Judge held that as the plaintiff was only one of the tenants-in-common who laid claim to the property, he was not entitled to maintain the suit alone. The Judge personally inspected the locality and on the strength of that inspection found that the property was included in the lease.

We are unable to agree with the District Judge. Although there is a difference of opinion regarding the right of one of the tenants-in-common to eject the lessee from the leased premises, there is no doubt that as against a trespasser any one of the co-owners

(1) 7 C. 414; 9 C. L. R. 76.
(2) 15 C. 40.
(3) 5 A. 602; A. W. N. (1883) 155.
(4) 6 M. L. J. 27.
(5) 1 A. L. J. 543; A. W. N. (1903) 119; 26 A. 528.
(6) 31 B. 381; 6 C. L. J. 5; 11 C. W. N. 72; 17 M. L. J. 347; 4 A. L. J. 461; 9 Bom. L. R. 671; 34 I. A. 115 (P. C.); 2 M. L. T. 435.
(7) 14 Ind. Cas. 377; 15 C. L. J. 138.
(8) 35 C. 807; 7 C. L. J. 483.

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can maintain an action. *Radha Proshad Wasti* v. *Esuf* (1), *Harendra Narain Singh Chowdhry* v. *Moran* (2), *Hira Lal* v. *Bhairon* (3) and per Best, J., in *Gopalasami* v. *Periasami Tevar* (4). Even in *Gopal Ram Mohuri* v. *Dhakeswar Pershad Narain Singh* (8), which lays down that one of the co-sharers is not entitled to sue the lessee in ejectment, it is recognised that the case of a trespasser will be different. This principle has been extended to members of a joint Hindu family. See *Pateshri Pratap Narain Singh* v. *Rudra Narain Singh* (5). We have not been referred to any authority in support of the position taken by the learned District Judge.

The District Judge is equally in error in basing his decision on the knowledge gained by him during the local inspection. The language of Order XXVI, rule 9, slightly differs from that of section 392 of the old Code. Under the Act of 1882, a Commissioner should be appointed only if the inspection "cannot be conveniently conducted by the Judge in person." Under rule 9, no such condition is imposed. Even under the old Code, it was held by the Judicial Committee of the Privy Council that a judgment should not be based solely on the result of the personal inspection by the Judge. *Kessowji Issur* v. *G. I. P. Railway Company* (6). The same reasoning applies to cases instituted under the new Code. See *Rai Kishori Ghose* v. *Kumudini Kanta Ghose* (7). The inspection which a Judge makes should be used by him only to test the accuracy and value of the evidence let in. He should not, without submitting himself to the test of cross-examination, make his knowledge the sole evidence for determining the question raised before him. We have no hesitation in holding that the procedure of the learned Judge has seriously prejudiced the appellant.

For both these reasons, we must reverse the decree of the District Judge and direct him to dispose of the appeal according to law. Costs will abide the result.

Appeal allowed

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 11 OF 1913-14 OF ETAWAH DISTRICT.

March 22, 1915.

Present:—Mr. Holmes, S. M. and Mr. Campbell, J. M.

NARAIN DAS—APPLICANT

versus

MIR KHAN AND OTHERS—RESPONDENTS.

Proprietary title, question of—Issue not decided—Appeal, whether lies to District Judge—Onus on wrong party—Finding based on no evidence—Revision, grounds for.

Where an issue which affected the claim to proprietary right under section 158 was decided neither by the Assistant Collector nor by the Commissioner:

Held, that no appeal lay in the case to the District Judge. [p. 61, col. 2.]

The mistaken view that the burden of proof is on the defendant to show that the land should not be resumed and a finding arrived at without any evidence to support it constitute a gross and palpable error of law in justifying interference in revision. [p. 62, col. 1.]

Application for revision of an order of the Commissioner of the Allahabad Division, dated the 17th March 1914, confirming the order of the Assistant Collector of Etawah, in the case of resumption of *muafi*.

JUDGMENT.

HOLMES, J. M.—The respondent raises a point that no appeal lay to the Commissioner at all, but that as a question of proprietary title was involved, the appeal should have lain to the District Judge. This point was not raised before the Commissioner.

The only point the Commissioner decided was as to the land being liable to resumption, and neither the Assistant Collector nor the Commissioner decided the other issue which affected the claim to proprietary right under section 158. The appeal seems to me to have been properly before the Commissioner.

It seems to me that both Courts have come to an entirely wrong conclusion on the question of resumption. No copy of the *wajib-ul-arz* of 1833 is on the record. Apparently the Court allowed the present appellant to send for that record and it was sent back. In such cases the proper procedure is to oblige parties to put a certified copy on the record. However, for present purposes, the *wajib-ul-arz* of 1833 is immaterial. The Record Officer has found that the present grant was sub-

sequent to 1833, and the conditions of any former grant which has been resumed are immaterial. There is no condition in the *wajib-ul-arz* as to resumption at the pleasure of the grantor, though there is a condition as to assessment of rent. A copy of the *wajib-ul-arz* is not on the record, but presumably it was not attested by the rent-free grantees, or the lower Courts would have mentioned it.

I would hold, therefore, that it is not established that the land falls within section 154 as held rent-free at the pleasure of the grantor.

I would, therefore, set aside the orders of the lower Court and remand the case under rule 23, Order XLI of the Code of Civil Procedure, for determination of the suit after trial of the remaining issue. Costs will follow event.

The Commissioner's mistaken view that the burden of proof is on the defendant to show that the land should not be resumed and the finding of the lower Courts in the absence of any evidence to support it that land is liable to resumption under section 154(1)(*a*) constitute a gross and palpable error of law which has caused substantial injustice, and the Board's interference on revision is, therefore, called for.

I have seen the *Wajib-ul-arzes* of settlements of 1883 and 1873, to see which after recording the above order I adjourned the case. The above order will hold good.

CAMPBELL, J. M.—I agree.

Application allowed; *Cause remanded.*

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 16 OF 1913.

March 19, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

AUTHIKESAVALOO NAICKER—PLAINTIFF—APPELLANT

versus

Syed SHAH ABDULLA HUSSAIN SAHIB KHADIRI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (*IV of* 1882), *s.* 53—*Right of simple mortgagee to bring suit under s.* 53 *of Transfer of Property Act to declare an alienation void—Creditor—Decree for sale of mortgaged property—Personal remedy if barred—Limitation Act* (*IX of* 1908), *Sch. I, Arts.* 120, 91, 95—*Civil Procedure Code* (*Act V of* 1908), *O. XXXIV, r.* 14.

A simple mortgagee who has obtained a decree for sale and whose right to a personal decree is not barred, is a "creditor" within the meaning of section 53 of the Transfer of Property Act and can bring a suit to set aside an alienation made in fraud of creditors. [p. 63, col. 2.]

To such a suit Article 120 and not Article 91 or 95 of Schedule I of the Limitation Act, 1908, applies. [p. 62, col. 2.]

Pachamuthu v. *Chinnappan*, 10 M. 213; *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu*, 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360, followed.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 56 of 1913.

FACTS.—The plaintiff instituted Original Suit No. 89 of 1909 in the City Civil Court at Madras on a mortgage executed in his favour and obtained a decree therein. His right to a personal decree was still subsisting. The mortgagor having alienated other portions of his properties to the 1st defendant, the plaintiff filed the present suit for a declaration that the said alienation was null and void as against him and the other creditors of the mortgagor under section 53 of the Transfer of Property Act and that the properties covered by the alienation were liable to be proceeded with in execution of the decree in Original Suit No. 89 of 1909. He also prayed that the 1st defendant might be restrained by an injunction from alienating the suit properties during the pendency of this suit.

Later on he put in petitions for amending the plaint by adding a new party and for inserting an allegation therein to the effect that he apprehended that he would not be able to recover his decree-amount in full by the sale of the properties mortgaged to him. Both these petitions were dismissed. The learned City Judge dismissed the suit. The plaintiff appealed.

Mr. *T. R. Venkatarama Sastri*, for the Appellant :—The plaintiff is entitled to bring the suit as he has done. He clearly comes within the scope of section 53 of the Transfer of Property Act. The learned Judge ought to have allowed the amendments prayed for.

The Court certainly erred in stating that the plaintiff had not tried to add one Hakim Muhammad Ghouse Sahib as a supplemental defendant. The residuary Article 120 of the Limitation Act, and not 91 or 95, applied to the case. *Vide Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu* (1) and *Pachamuthu* v. *Chinnappan* (2). The decision of the learned Judge cannot, therefore, be supported.

The Respondents were unrepresented.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The learned City Civil Judge correctly describes the suit as praying for a declaration that the sale of the property mentioned in the plaint on 1st April 190[illegible], in favour of 1st defendant is null and void against plaintiff and that it is liable to be proceeded against in execution of the decree in Suit No. 89 of 1909 passed in favour of the plaintiff. The learned Judge further describes the suit as praying for an injunction restraining the 1st defendant from alienating the plaint property, but this seems inaccurate.

Turning to that portion of paragraph 12 of the plaint which refers to injunction, the prayer contained in that portion is that the 1st defendant be restrained by an injunction from alienating the plaint property in any manner "*pending the disposal of this suit.*" This cannot be treated as a prayer for an injunction to be embodied in the decree to be passed in the suit, but only as a prayer for an interlocutory order of injunction. Treating then this suit as a suit for a declaration of the invalidity of the alienation in favour of the 1st defendant as against the plaintiff, who is a creditor under a simple mortgage bond and who has obtained a decree for sale and who expected to get a decree on the personal covenant contained in the mortgage-deed after the mortgaged property was sold in execution of the decree passed in Suit No. 89 of 1909, the questions for decision are (1) whether he is a creditor within the meaning of section 53 of the Transfer of Property Act and, therefore, entitled to bring a suit to have it declared that the alienation was in fraud of him and other creditors and is void as against him and them, and (2) whether his suit is barred by limitation.

Having regard to Order XXXIV, rule 14 of the Civil Procedure Code (Old section 90 of the Transfer of Property Act), it cannot, in my opinion, be argued that a simple mortgagee, whose rights under the personal covenant have not been barred, is not a creditor of the mortgagor and that he is not entitled to bring a suit to declare the invalidity of the alienations of other properties by his mortgagor (debtor).

As regards the question of limitation, I think the cases of *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu* (1) and *Pachamuthu* v. *Chinnappan* (2) establish that the limitation for a suit of this nature is provided for by the general Article 120 (6 years) and not by Article 91 or 95 of the first Schedule to the Limitation Act. The decision of the learned City Civil Judge that the suit is barred by the three years' period of limitation cannot be sustained.

I must also state that the observation of the learned City Civil Judge in his judgment, dated 10th May 1913, that the plaintiff had taken no steps whatever to add Hakim Muhummad Ghouse Sahib as a party to the suit, is not accurate as the plaintiff on the 12th March 1913 had applied to the lower Court for bringing Hakim Muhammad Ghouse Sahib on record as the 8th defendant in the case and also prayed for an amendment of the plaint. Another amendment petition, filed on the 18th March 1913, also makes it clear that he wanted Hakim Muhammad Ghouse Sahib to be made a party and to amend the plaint by inserting additional allegations. to the effect that the plaintiff apprehended (and I take it that he meant it was a reasonable apprehension) that the sale of the mortgaged properties in execution of the decree in Suit No. 89 of 1909 could not fetch the whole of the amount due under the decree. I would, therefore, further set aside the orders of the learned City Civil Judge refusing the prayers of the two petitions, dated 12th and 18th March 1913, and would grant the prayers of those petitions. The amendments should be made by the plaintiff within two weeks of the receipt of the records by the City Civil Court or such other time as may be allowed by that Court. The

(1) 30 M. 402; 17 M. L. J. 288; 2 M. L. T. 360.
(2) 10 M. 213.

decision of the City Civil Judge is set aside and the suit remanded for disposal on the other issues, which arise on the pleadings already on record and which might hereafter be raised in due course of law.

Costs hitherto incurred will abide the result.

NAPIER, J.– I concur.

Appeal allowed; Suit remanded.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 30 OF 1912-13
OF ALLAHABAD DISTRICT.
December 13, 1913.

Present:—Mr. Baillie, S. M., and
Mr. Tweedy, J. M.

Chaudhri KAMAL-UD-DIN – PLAINTIFF—APPLICANT

versus

RAMZAN ALI—DEFENDANT—RESPONDENT.

Sir *land—Co-sharers—Share of one co-sharer sold —No separation—Exproprietary right* – Sir, *character of.*

S sold his share of 7 pies out of a 5 annas and 9 pies share in the *mahal* to the plaintiff long ago, but *S* neither claimed exproprietary rights in the *sir* to the extent of his 7 pies share out of the *sir* of the 5 annas 9 pies co-sharers, nor was this portion of land separated from the rest. The plaintiff brought the present suit for the ejectment of the tenant who claimed occupancy rights. The Courts below held that in consequence of this sale, the land lost its character of *sir* to the extent of 7 pies share and that the respondent who was the tenant of the *sir* land held partly as occupancy tenant and partly as sub-tenant and could not be ejected:

Held, that had the portion of the land, corresponding to *S*'s share, been divided off, it would have ceased to be *sir*, but this not having been done, it still retained its character as *sir*.

Application for revision of an order of the Commissioner of Allahabad Division, dated the 31st March 1913, confirming that of the Assistant Collector of Allahabad District, in the case of ejectment.

JUDGMENT.

BALLIE, S M. (*December 4th*, 1913.)—The land now in question was part of the *sir* of a 5 annas and 4 pies share in the *mahal*. Out of this 5 annas and 4 pies a co-sharer, Sadik Ali, sold his rights extending to something over 7 pies to one of the plaintiffs. The lower Court and the Commissioner have held that as a consequence of this sale the land lost its character of *sir* to the extent of a 7-pies share, that respondent, who was the tenant of the *sir*, held partly as occupancy tenant and partly as sub-tenant, and this being so could not be ejected. There cannot be the slightest doubt that this view of the law is entirely erroneous. The land in question was the *sir* of the 5 annas 4 pies co-sharers. The right of the co-sharers other than Sadik Ali extended to every part of the *sir* area and even when Sadik Ali transferred his share the whole of the land in question still remained the *sir* of the other co-sharers. Nothing had occured to affect their rights in the entire area and occupancy rights could not, therefore, be acquired in it. It is true that if Sadik Ali had claimed ex-proprietary rights and had a portion of the land corresponding to his share divided off, then such portion would have ceased to be *sir*. But this has not been done and beyond doubt the entire *sir* area still retains its *sir* character. The only question on which doubt can be entertained is whether there is, in the mistake of law committed, ground for revision. That it causes serious injustice cannot be doubted. There is no process of law by which this holding can be divided up and the part in which ex-proprietary rights accrued separated off from the rest. The result, therefore, is that the *sir* rights of the persons entirely unconcerned with the sale by Sadik Ali disappear in the area now in question and that a person who was undoubtedly a tenant of *sir* land and knew that he was a tenant of *sir* land, has obtained a possession which cannot now be disturbed.

I consider that the erroneous view of the law taken by the Commissioner was such as to justify revision. I would allow this application with costs on respondent.

TWEEDY, J. M.– I entirely agree.

Application allowed.

BOMBAY HIGH COURT.

CRIMINAL REVISION PETITION No. 407 OF 1914.

February 27, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

JAMNADAS VASANJI—ACCUSED —APPLICANT

versus

EMPEROR—PROSECUTOR—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 179—*Penal Code* (*Act XLV of* 1860), *s.* 415—*Cheating—Deceit—Jurisdiction—Court within whose jurisdiction complainant deceived.*

The accused, a trader of Salem in the Madras Presidency, deceived a trader in Dhulia in Bombay Presidency by leading him to believe that he was buying clean ground-nut oil when, in reality, he was buying a mixture of ground-nut oil with rock oil. The Dhulia trader was induced by the deceit to pay the price agreed upon on the understanding that it was clean oil:

Held, that the complainant was deceived in Dhulia and the Courts at Dhulia had jurisdiction to hear the case.

Criminal revision from an order passed by the first Class Magistrate of Dhulia.

Messrs. *Inverarity* and *Setalvad* (with them Messrs. *D. G. Dalvi* and *Bicknell*, *Merwanji Romer & Co.*), for the Accused.

Mr. *Strangman*, Advocate-General (with him Messrs. *J. G. Rele* and *Mehta*, *Dalpatram & Lalji*), for the Complainant.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

HEATON, J.—This may be a hard case, but it seems to me to be a case as to which the law is quite clear. There is an accusation of cheating against a trader of Salem in the Madras Presidency. The alleged cheating is that he deceived a trader in Dhulia in this Presidency by leading him to believe that he was buying clean ground-nut oil when, in reality, he was buying a mixture of ground-nut oil with rock oil. The Dhulia trader, it is said, was induced by the deceit to pay the price agreed upon on the understanding that it was clean oil. If the facts are as I have stated, there is a case of cheating. One of the essential ingredients of cheating, one of those things without which there cannot be cheating as defined in the Indian Penal Code, is deceit. There must be a person who deceives and a person who is deceived. Here, according to the allegations, the person who was deceived was at Dhulia, it

was there that he was the victim of the deceit, there that he was led to believe that which was untrue. Section 179 of the Criminal Procedure Code says that when a person is accused of the commission of any offence by reason of anything which has been done, then the offence may be inquired into by a Court within the local limits of whose jurisdiction the thing has been done. Here the thing which has been done is the deceiving of the complainant. He has been deceived in Dhulia, and to me, at least, it is clear, absolutely clear, that under the law the Courts at Dhulia have jurisdiction in this case. Whether the Courts at Dhulia are the Courts which, with the best regard for the administration of justice, ought to hear the case is another matter. But we are here concerned with the bare question of law. There is no application before us of any kind except to interfere on the ground that the Dhulia Court is without jurisdiction, and we are unable to say that the Dhulia Court is without jurisdiction. Therefore, I think, the Rule should be discharged.

SHAH, J.—I agree.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 181 OF 1915.

March 26, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

MOHAN LAL—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *ss.* 423 (1), 439 (3)—*Reference Power of Sessions Judge in appeal —Acquittal — Procedure — Enhancement of sentence whether a fit ground for ordering re-trial.*

Where a Sessions Judge sitting in appeal is of opinion that an accused should be acquitted, he ought not to refer the case to the High Court. It is his duty to allow the appeal and acquit the accused. [p. 66, col. 1.]

Where a Sessions Judge sitting in appeal thinks that the case ought to have been tried by the Court of Sessions, he should himself set aside the conviction and order a commitment under section 423 (1) (*b*) of the Code. [p. 66, col. 1.]

Queen-Empress v. *Maula Bakhsh*, 15 A. 205; A. W. N. (1893) 105, followed.

The power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised. [p. 66, col. 2.]

In re DYAWAPPA BASGUNDA PATIL.

Criminal reference made by the Sessions Judge, Barielly, as per his letter No. 82/111, dated the 19th February 1915.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This case comes before us as a reference from the learned Sessions Judge of Bareilly. Four persons, Mohan Lal, Baldeo Prasad, Debi Sahai and Ram Ghulam, were all tried by a Magistrate on charges under section 408 read with section 114 of the Indian Penal Code, and convicted. They all appealed to the Sessions Judge. He seems to have been of opinion that the case against Debi Sahai was not proved. He was also of opinion that the punishments awarded to the other three were insufficient. He has submitted the case to this Court with a recommendation that we should acquit Debi Sahai and enhance the sentences passed on the other three. So far as his recommendation that we should acquit Debi Sahai is concerned, it is quite clear that it was his duty to either dismiss or allow the appeal of Debi Sahai. The learned Sessions Judge ought not to have referred the case of Debi Sahai to this Court at all. With regard to his recommendation for enhancement the learned Sessions Judge seems to have everlooked the provision of section 439 (3) of the Code of Criminal Procedure which is as follows:—"Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a.....Magistrate of the first Class." The Magistrate of the first Class has given the full amount of imprisonment which he could give under the law. It follows, therefore, that a higher sentence could not be passed without a re-trial. If the learned Sessions Judge thought that the case ought to be re-tried by the Court of Session, he ought himself to have set aside the conviction and ordered a commitment under section 423 (1) (*b*). That he has power to do this has been ruled in the case of *Queen-Empress* v. *Maula Bakhsh* (1). We think, however, that the power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised. We do not for one moment wish to be taken as saying that the offence for which the accused have been found guilty (particularly under the present circumstances), was not a most serious one. Nor do we wish to say that it would not have been better if the accused had been committed in the first instance to the Court of Sessions. At the same time the sentences cannot be said to have been nominal sentences. There is a strong principle that a man ought not to be tried a second time unless there are very grave reasons for so doing.

The only order we feel bound to pass is that the record be returned to the learned Sessions Judge that he may complete the disposal of the appeals. We order accordingly.

Record returned.

(1) 15 A. 205; A. W. N. (1893) 105.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION No. 384 OF 1914.

January 29, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

In re DYAWAPPA BASGUNDA PATIL —DEFENDANT—APPLICANT.

Criminal Procedure Code (Act V of 1898), *ss.* 145 146—*Order "not to obstruct" without taking evidence, if final—Procedure.*

In a proceeding under section 145, Criminal Procedure Code, the preliminary order was made, the statements of the parties as required by clause (4) of the section were put in, but the Magistrate without examining the parties or taking any evidence ordered a party "not to obstruct":

Held, that the order was not a final order under the section and that if there was still a danger of a breach of the peace, the Magistrate must complete the proceedings as required by section 145 and make a proper order either under that section or under section 146. [p. 67, col. 1.]

Criminal application for revision from an order passed by the Sub-Divisional Magistrate, Bijapur.

Mr. *V. V. Bhadkamkar*, for the Applicants.

Mr. *P. D. Bhide*, for the Opponents.

MULLA *v.* EMPEROR.

JUDGMENT.

HEATON, J.—We have been applied to in this case to interfere in our revisional jurisdiction with what purports to be an order made under section 145 of the Criminal Procedure Code. The view of the case that I take is that no final order has been made under section 145. The preliminary order was made, the statements of the parties as required by clause 4 of the section were put in, but thereafter there was no oral examination of the parties or taking of evidence. There was no decision as required by clause 6, nor was there a declaration as required by that clause. There was simply an order that a person was "not to obstruct, etc." Where, as here, all the most essential things that go to the making of the order were absent, I can only say that I regard the order made as not a final order under the section.

The position, therefore, stands thus: if there is still a danger of a breach of the peace, the Magistrate must complete the proceedings as required by section 145 and make a proper order either under that section or under section 146. If, however, there is no longer any danger of a breach of the peace, the proceedings may be dropped.

SHAH, J.—I agree.

Ordered aocordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 159 OF 1915.

April 8, 1915.

Present:—Justice Sir George Knox, KT.

MULLA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 456—Lurking house trespass—Criminal intent—Burden of proof.

The accused who was a complete stranger was found inside the complainant's house at 2 A. M. in the morninn, having entered the house by a door which the complainant had taken care to secure at night. When arrested, the accused said that he had gone inside the house in connection with an illegal intimacy with the complainant's aunt, who was a widow:

Held, that the accused was guilty under section 456 of the Penal Code. [p. 69, col. 2.]

Held, further, that as the intent with which he went inside was a matter within the knowledge of the accused, the burden of proving that his intention was an honest intention lay on him. [p. 67, col. 2.]

Criminal revision against an order of the Sessions Judge of Cawnpore.

Mr. *Kailas Nath*, for the Applicant.

Mr. *Malcomson*, for the Crown.

JUDGMENT.—The facts found in this case are as follows. Suraj Kumar, a Brahmin and cultivator left his house on the 26th of December 1914. His intention was to catch a train and go into Cawnpore. He took the precaution of having his house carefully closed for the night. He returned, having missed his train, somewhere about 2 A. M. He found the door which had been securely closed wide open. He says that somewhere inside his house, he caught hold of Mulla, a *gadaria*, who was trying to escape and that on Mulla's person were certain jewels, the property of Suraj Kumar. This portion of the evidence has apparently been discredited by both Courts and for the purpose of this case this alleged fact may be omitted from consideration altogether. The accused, when he was caught by Suraj Kumar, said that he had gone inside the house in connection with an illegal intimacy with Suraj Kumar's aunt, who is said to be a widow.

The facts then that have to be faced are a complete stranger is found inside a Brahmin's house at 2 A. M. in the morning having entered that house by a door which the Brahmin had taken care to secure at night. He is inside the house and when discovered is trying to escape. He does not, when arrested by the owner of the house, make any statement to the effect that he is there with any lawful intent. The intent with which he went was a matter within his knowledge, the burden of proving that his intention was an honest intention lies upon him. In the present case he alleges that he went with the intention of pursuing an intimacy, I will not call it criminal just now, but an intimacy with a Brahmin widow. He is not able to establish that any illegal intimacy of any kind had existed at any time between him and the Brahmin widow. Looking to the words contained in section 3 of the Evidence Act, I hold that both the Courts below were right in holding that it had been fully proved that the accused had committed lurking house trespass by night and that it is very doubtful whether they erred in holding that an offence under section 457 had been established against the accused.

I am asked to interfere in revision against this conviction and sentence, because no offence under section 457, Indian Penal

Code, has been made out and the conviction is bad in law. A long and laboured argument has been addressed to me which really rests on this, at its strongest point, that it was for the prosecution to establish criminal intention and that until they proved that criminal intention the accused was entitled to an acquittal.

The learned Vakil who appeared for the applicant took his stand upon the case of *Emperor* v. *Jangi Singh* (1), and drew my attention in particular to the words to be found in this ruling at page 195: "His intention possibly was to obtain possession contrary to law, but this of itself would not constitute criminal trespass. Proof of an intention to commit an offence or to intimidate, insult or annoy was necessary. There was no evidence of any such intention, or from which such an intention might be reasonably inferred." The facts of that case are somewhat peculiar. A *zemindar* had a quarrel with an occupancy tenant and when he was absent from the village by reason of ill-health, he induced the *patwari* to record that the occupancy tenant had left the village and abandoned his holding, and thereupon took possession of it. The learned Chief Justice, who decided *Emperor* v. *Jangi Singh* (1), evidently arrived at the conclusion that the facts found in this case were not sufficient to establish a *prima facie* case of criminal trespass and it was necessary to consider further what was the intention of the *zemindar* who entered on this occupancy holding.

I was also referred to the ruling of *In the matter of the petition of Gobind Prasad* (2).

The line of argument in this case, if carefully considered, will be found to be much the same. In that particular case the Pleader who appeared to support the case went so far as to say that where an entry upon property is in itself illegal, that is sufficient to establish one of the criminal intents required by section 441, and it was held by Mr. Justice Straight "that the intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires". With all due respect to the learned Judge, this has, in my opinion, been too broadly stated and I note that it has not been followed by some of the Courts. Cases of this kind really rest upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused, it is for the accused to rebut that guilty intention, and if he does not so rebut it, the guilty intent is as much found against him as his entry into or upon the property

In *Sellamuthu Servaigaran* v. *Pallamuthu Karuppan* (3) the learned Judges who decided that case, and one of them was a Hindu Judge of great experience, referred to a previous case of *Queen-Empress* v. *Raya Padayachi* (4) and held that the law on this point was correctly laid down in that case: "Although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain, is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result. In the present case the ordinary and natural consequences of the petitioners' acts would be to annoy the owner of the house and to intimidate and annoy his servant who was holding possession for his master, and the petitioners, as reasonable men, must have known that such consequences would flow from their acts. They must, therefore, in my judgment, be held to have acted with intent to intimidate and annoy within the meaning of the section, and the petitions must be dismissed."

In a previous case of this Court which came before me where I had to do with a very similar case, *Emperor* v. *Ishri* (5), I held that when an accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli*, it was for the accused to prove that his intention was an innocent one and in that case I referred to a previous case of *Brij Basi* v.

(1) 26 A. 194; A. W. N. (1903) 230; 1 Cr. L. J. 362
(2) 2 A. 465.
(3) 9 Ind. Cas. 152; 21 M. L. J. 161; 9 M. L. T. 283; 12 Cr. L. J. 30; 35 M. 186.
(4) 19 M. 240; 1 Weir 537.
(5) 29 A. 46; A. W. N. (1906) 279; 3 A. L. J. 652; 4 Cr. L. J. 291.

Queen-Empress (6), which I distinguished from the case before me. I see no reason to depart from what I then laid down.

The learned Vakil for the applicant drew my attention to another case, *Premanundo Shaha* v. *Brindabun Chung* (7). In that case the learned Judges delivered themselves of certain observations which were *obiter dicta*, which otherwise went tc support the contention set up by the Vakil.

In my mind to hold that if a stranger who is found inside a *zenana* at two in the morning can escape from the consequences of his act by saying that he came there at the bidding of the wife or other inmate, would be a most dangerous doctrine and the act is deserving of severe punishment. This brings me to the third point raised in this application *i.e.*, that the sentence of six months is unduly severe. I am not prepared to accede to this. The result is that I find the accused guilty under section 456 of the Indian Penal Code, but I do not interfere with the sentence passed. The accused is said to be on bail, he will surrender to his bail and complete his sentence.

Petition dismissed.

(6) 19 A. 74; A. W. N. (1896) 178.
(7) 22 C. 994.

BOMBAY HIGH COURT.

CRIMINAL REVISION APPLICATION NO. 450 OF 1914.

February 16, 1915.

Present:—Mr. Justice Heaton and Mr. Justice Shah.

GULAM HYDER PANJABI—ACCUSED APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (*Act XLV of* 1860), *ss.* 337, 338—Hakim *performing operation on eyelids—Ordinary precautions not taken—Acting rashly and negligently—Hurt—Offence* —Hakim *giving himself out as skilled operator, liability of.*

The accused, a *Hakim*, performed an operation, on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. The most ordinary precautions were entirely neglected. The operation was needless and was not in accordance with any recognized Indian method:

Held, that the accused acted so rashly and negligently as to endanger human life or the personal safety of another; that as there was not the permanent privation of the sight of either eye in consequence of the operation the accused was guilty of an offence under section 337, Indian Penal Code, and not under section 338, Indian Penal Code. [p. 69, col. 2; p. 70, col. 1.]

Where a *Hakim* gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. [p. 70, col. 1.]

Criminal application for revision from conviction and sentence passed by the Second Preisdency Magistrate, Bombay.

Mr. *P. N. Godinho*, for the Accused.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—The applicant in this case has been convicted of causing grievous hurt by a rash and negligent act under section 338, Indian Penal Code.

It is urged on his behalf that his act was neither rash nor negligent as alleged by the prosecution, that he is protected by section 88 of the Indian Penal Code, as the complainant consented to suffer the harm caused to her, and that the hurt caused is not proved to be grievous hurt. As regards the first contention, the facts which are either proved or admitted are these: The accused, who is a *Hakim*, performed an operation on the outer side of the upper lid of the right eye of the complainant. The instruments used were a pair of scissors and a needle, which would be ordinarily used by a tailor and not by an eye-surgeon. The wound was sutured with an ordinary thread. As the Magistrate correctly finds, the most ordinary precautions, such as using proper instruments for the operation as well as for protecting the eye-ball, disinfecting and sterilizing the instruments and using antiseptics, were entirely neglected. The medical evidence shows that the operation was needless and performed in a primitive way. It is not shown that it was in accordance with any recognized Indian method. Dr. Prabhakar, who has been examined on behalf of the defence, says that he has not seen lid operations performed by *Hakims*, though he has seen cataract operations performed by them. On these facts, it was quite open to the learned Magistrate to find that the accused acted so rashly and negligently as to endanger

human life or the personal safety of others. For where, as here, a *Hakim* gives out that he is a skilled operator and charges considerable fees, the public are entitled to the ordinary precautions which surgical knowledge regards as imperative. To neglect such precautions entirely is negligence such as is contemplated by the criminal law. This case has been very fully argued before us; but we have heard nothing to induce us to think that the finding of the lower Court is not proper. The fact of the accused having treated a large number of cases and, according to him, successfully, was relied upon by Mr. Godinho. Quite apart from the infirmity of the evidence bearing on this point, which has been mentioned by the Magistrate, it appears that in many cases the diseases treated and the operations performed by the accused were quite different. And there is not a single case in which it is shown that the disease and the circumstances connected with the operation were the same as in this case. This renders the evidence relating to these several cases practically useless, if not irrelevant. The point in the case is not whether the petitioner is at liberty to use such skill as he may possess in performing such operations, but whether, in doing so, he has acted rashly or negligently. It matters not, for this purpose, whether a practitioner is trained or not; he is bound by law to avoid such rashness or negligence as would endanger human life or the personal safety of others, if he undertakes an operation. In our opinion, the petitioner has been properly found to have acted rashly and negligently.

As regards the argument based on section 88 of the Indian Penal Code, it is rather difficult to accept the learned Magistrate's finding that the accused acted without the complainant's consent and against her wish. If he did so, he would be guilty of causing hurt, simple or grievous, whichever it may be, quite independently of the consideration whether he acted rashly or negligently. This apparently is not the prosecution case, and that is not the charge against him. The gravamen of the charge against him is that he acted rashly and negligently. On the evidence, what appears to have happened is this. When the complainant was taken to the accused the latter pursuaded her to accept his treatment and her companion, Sayad Hassanally, who had taken her to the accused and who apparently had faith in the skill of the accused as a *Hakim*, wanted her to submit to his treatment. The complainant had neither time nor opportunity to realise what it was that she was asked to submit to; but on the pursuasion of both she submitted to the operation. In that sense she consented to the operation. But she hardly realised the harm or the risk of the harm which the operation involved, and did not consent expressly or impliedly to the harm or the risk of the harm as required by section 88 of the Indian Penal Code. It is not suggested—certainly not proved—in this case that the complainant had anything like a real opportunity to realise the nature of the accused's act, and the harm and the risk incidental to that act so as to be a consenting party to the operation in whatever manner it might be performed. It is clear, therefore, that the accused is not protected by section 88 of the Indian Penal Code, even if we assume that the other conditions necessary to invite the application of that section are fulfilled.

Lastly, it is urged that the hurt caused is not proved to be grievous. The medical evidence on this point is that as a result of the operation performed by the accused, complainant's eye-sight would be permanently damaged to a certain extent. This is not sufficient to establish that there has been a permanent privation of the sight of either eye in consequence of the operation. It is not suggested in this case that the hurt is otherwise grievous as defined by section 320 of the Indian Penal Code. This contention appears to be good, and must be allowed.

As regards the sentence, having regard to all the circumstances a substantial fine would meet the justice of the case and no sentence of imprisonment is necessary.

The result, therefore, is that the conviction under section 338 is set aside and the petitioner is convicted of causing hurt under section 337, Indian Penal Code. The sentence of imprisonment is set aside and that of fine confirmed. The order as to compensation must, of course, stand.

Conviction and sentence altered.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 375 OF 1913.

March 2, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

BODDU RAMAYYA—PETITIONER—APPELLANT

versus

CHITTURI SURAYYA AND ANOTHER—COUNTER-PETITIONERS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 195, cls. (6), (7)—Subordinate Judge empowered to entertain appeals, whether Court—Jurisdiction—Sanction, revocation of—Penal Code (Act XLV of 1860), s. 209—Claim, meaning of—Madras Civil Courts Act (III of 1873), s. 8.

Where, by a notification issued under the Madras Civil Courts Act (III of 1873), Government empowers all Subordinate Judges in the Madras Presidency situated in a place different from that of the District Court, to receive appeals direct and not by transfer from the District Court, such Subordinate Judges are Courts to which appeals "ordinarily lie" from the subordinate Courts within the meaning of section 195 (7) of the Code of Criminal Procedure, and such Subordinate Judgs have jurisdiction to revoke on appeal the sanction to prosecute for an offence under section 209, Penal Code, granted by a subordinate Court. [p. 71, col. 2.]

In re Anant Ramachandra Lotlikar, 11 B. 438, referred to.

In the matter of Subbamma, 17 M. 124; 2 Weir 206; *Ram Charan Chandra* v. *Tirupulla Sheikh*, 13 Ind. Cas. 1007; 39 C. 774; 13 Cr. L. J. 191; 16 C. W. N. 645, distinguished.

The word "claim" used in section 209, Indian Penal Code, cannot refer to a document produced in evidence to substantiate the relief asked for in a suit. [p. 71, col. 1.]

Civil miscellaneous appeal from an order of the Court of the Subordinate Judge of Kistna at Ellore, in Miscellaneous Appeal No. 3 of 1913, preferred against that of the Court of the principal District Munsif of Tanuku, in Miscellaneous Petition No. 4272 of 1911, in Original Suit No. 235 of 1911.

Mr. *P. Narayanamurthi*, for the Appellant.

Mr. *T. Prakasam*, for the Respondents.

JUDGMENT.—Mr. Narayanamurthi takes exception to the jurisdiction of the Subordinate Judge of Ellore to hear the appeal. The District Munsif of Tanuku refused to grant sanction in this case against the plaintiff. Thereupon the defendant appealed to the Subordinate Judge to grant the sanction. It is not disputed that the Government have, by a notification issued under the Civil Courts Act, empowered Subordinate Judges to receive appeals direct in all cases where the Sub-Court is situated in a place different from that of the District Court. The Ellore Sub-Court is one of the Sub-Courts thus empowered and appeals from the Tanuku Court will lie to that Court. It is argued by the learned Vakil for the appellant that as the Civil Courts Act directs all appeals to be presented to the District Court except in cases where there is a notification, the Court to which appeals *ordinarily lie* is the District Court within the meaning of clause (6) of section 195 of the Code of Criminal Procedure. We fail to see why a Court to which by a Government notification appeals are directed to be presented is not a Court to which appeals *ordinarily lie*. It is with a view to settle this question and to meet the suggestion made in *In re Anant Ramachandra Lotlikar* (1), that the term *ordinarily* refers to a tribunal to which the majority of the appeals are presented, that an explanation was added by the Legislature in the Act of 1898. That explanation is a complete exposition of the term *ordinarily* and under it, the Subordinate Court will be the forum to which the appeals *ordinarily lie*. The decision in *In the matter of Subbamma* (2) is not against this conclusion. Under section 407 of the Code of Criminal Procedure appeals lie only to the District Magistrate. The appeals may be transferred for disposal by the District Magistrate to such first Class Magistrates as have been empowered by the Local Government to hear appeals. Therefore, the first Class Magistrate is not a Court to whom appeals lie either ordinarily or otherwise. In *Ram Charan Chandra* v. *Tirupulla Sheikh* (3), the Court which heard the sanction appeal had only jurisdiction to hear civil appeals on transfer by the District Judge. In *Ram Charan Chandra* v. *Tirupulla Sheikh* (3), it was conceded that the High Court had not empowered the Subordinate Judge to entertain appeals. The language of clause 7 (*a*), section 195, leaves no room for doubt that in Madras all the Subordinate Jadges who have been empowered by a notification to entertain civil appeals will be Courts to which appeals *ordinarily lie* under section 195 of the Code of Criminal Procedure.

On the merits, we feel no doubt that section

(1) 11 B. 438.
(2) 27 M. 124; 2 Weir 206.
(3) 13 Ind. Cas. 1007; 16 C. W. N. 645; 39 C. 774; 13 Cr. L. J. 191.

In re IRULA SADAYAN.

209 has no application. The word *claim* in that section cannot refer to a document produced in evidence to substantiate the relief asked for in the suit.

As for section 471, the materials placed before us by the appellant do not enable us to say whether the document was produced on a summons as a witness and how it came to be marked for the plaintiff. Under these circumstances, no case has been made out before us for granting sanction under that section.

We must dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REFERENCE No. 1 OF 1915.

March 1, 1915

Present:—Mr. Justice Ayling, Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

In re IRULA SADAYAN *alias* PERIA SADAYAN—ACCUSED.

Penal Code (Act XLV of 1860), s. 379—Accused found in possession of skin of missing goat—Charge of theft—Identification doubtful—Verdict of Jury, when can be set aside—Criminal Procedure Code (Act V of 1898), s. 307 (3).

When the accused was found in possession of two freshly flayed skins of a goat and kid within 24 hours of the theft and was charged under section 379 of the Penal Code:

Held, (*Spencer, J., dissenting*), (1) that it was absolutely necessary for the prosecution to establish that the skins found on the accused were those of the goats recently stolen; [p. 74, col. 2.]

(2) that as the prosecution witnesses had not seen the skins for more than three weeks after the theft, the Jury were not wrong in holding that the identification was suspicious; [p. 73, col. 2.]

(3) that the accused was entitled to the benefit of the doubt and ought to be acquitted. [p. 74, col. 1.]

It is not necessary to show that the verdict of a Jury is perverse and manifestly unreasonable before the High Court can set it aside, but as the Jury are Judges of fact, before their verdict is set aside, it must be established that the conclusion come to by them does not follow from the evidence recorded in the case. [p. 73, col. 2.]

Emperor v. *Annada Charan Thakur*, 2 Ind. Cas. 417; 36 C. 629; 13 C. W. N. 757; 9 C. L. J. 638; 10 Cr. L. J. 32, referred to.

Reference under section 307 of the Code of Criminal Procedure, 1898, by the Sessions Judge of the South Arcot Division, in Case No. 1 of his Calendar for 1915.

This reference coming on for hearing on the 8th February 1915 and Counsel not appearing on behalf of the accused, upon perusing the Sessions Judge's Letter of Reference No. 170, dated 8th January 1915, and the record of the evidence and proceedings before the Court of Session, and upon hearing the arguments of the Public Prosecutor on behalf of Government and the case having stood over for consideration till the 11th February 1915, the Court (Spencer and Seshagiri Aiyar, JJ.) delivered the following

JUDGMENT.

SPENCER, J.—The reasons which the Jury voluntarily expressed as the ground of their verdict of 'not guilty' indicate, in my opinion, that they had no good reasons for their decision and that the verdict is one which should not be accepted.

The Judge had an equal opportunity of observing the demeanour of the witnesses and he was satisfied with the evidence of prosecution witnesses Nos. 1 and 2 that the skins were those of their missing she-goat and kid. The delay in putting in a formal complaint of theft has been accounted for by the prevailing floods. It could not be expected that any other witnesses would be forthcoming to speak to the identity of particular animals in a flock besides the shepherd and his son who assisted him in pasturing them; the knowledge that such shepherds possess as to the animals composing their flock is likely to be intimate; and in this instance the existence of two skins renders the chance of a mistaken identity doubly improbable.

Moreover, this is a case in which the Jury would be wrong if they laid undue stress on a question of identification. For it was not the accused's case that the skins were not stolen ones. He stated in the Magistrate's Court that a man dropped the skins near him when he was sleeping, that he chased him but was unable to catch him and that next day he picked up the skins and took them to Manalurpet to sell them.

Thus the first reason given by the foreman will not justify the Jury's verdict. The second reason that the accused was prejudiced by not employing a Pleader to defend him is not a proper reason to give for acquitting him. As the Jury are shown to have acted on considerations which ought not to have influenced their decision, we may discard their verdict and see if there is sufficient evidence to convict the accused.

The 3rd prosecution witness is the person to whom the accused was about to sell the

skins. If his demeanour or answers were in any way suspicious, it would be consistent with his position as a would-be purchaser of stolen goods. The accused's possession of the skins is proved by other evidence and is not denied by him. The prosecution case does not depend on the 3rd witness's evidence. The accused was found in possession of stolen property the day after the theft and he failed to account satisfactorily for his possession of it.

Under these circumstances I have no hesitation in agreeing with the Sessions Judge that the guilt of the accused has been proved and I would convict him under section 379 of the Indian Penal Code.

But as my learned brother is of a different opinion, the case will be referred under section 429 of the Criminal Procedure Code to a third Judge.

SESHAGIRI AIYAR, J.—In this case, I have the misfortune to differ from my learned colleague. The accused was charged with having committed theft of a goat and its kid on the 21st November 1914. The story for the prosecution is that the next day the accused was seen in the stall of the 3rd witness for the prosecution with the skins of the two goats and as his explanation regarding the possession of the skins was not satisfactory, he was arrested. There was no complaint of the theft of the goats until the 4th of the next month. The evidence of the 1st prosecution witness is that these goats were stolen from his house on the night of the 21st November and that he is able to identify the skins as belonging to the stolen goats. In aswer to the Court he said "I saw the skin on the 4th Saturday after the loss." The 2nd witness is the son of the 1st prosecution witness, and he says that the two skins before the Court are those of the goat and of the kid which were stolen. The 3rd prosecution witness is a man who keeps a tannery and he stated that the accused had a bundle of salted skins in his possession, that the skins were fresh flayed, and that while he was bargaining for their purchase the Head Constable came there and arrested the accused. This is the whole of the evidence in this case. The Jury unanimously found the accused not guilty. Apparently the Sessions Judge asked their reasons for the opinion with reference to *Emperor* v. *Chellan* (1), and they replied that the identification was suspicious and that the absence of a Pleader for the defence prejudiced the accused. The Sessions Judge points out in his order of reference that the demeanour of the 3rd prosecution witness in the witness box very likely impressed the Jury against him. But he has referred the case to the High Court on the ground that the evidence establishes the guilt and that the Jury were wrong in their verdict. I am aware that it has been held that it is not necessary to show that the verdict of the Jury is perverse and manifestly unreasonable before the High Court can set it aside. See *Emperor* v. *Annada Charan Thakur* (2). At the same time applying the test which would ordinarily be enforced in any appeal, the High Court has to be satisfied that the verdict of the Jury is wroug. The Jury are the Judges of facts and before their verdict is set aside, it has to be established that the conclusion come to by them does not follow from the evidence recorded in the case.

The complaint as regards the theft was not made until 17 days after the occurrence. A number of explanations are given in Exbibit A as to the delay in presenting the complaint after such a length of time. One reason is that the complainant informed his master of the theft the next day; but his master has not been called to prove that this information was given. A second explanation is that there were heavy floods and the complainant could not "come this side." It is impossible to believe this story, for I find that the *monigar* of Manalurpet, to whom the complaint should have been made and who was examined as the prosecution 4th witness, says that the accused and the kins were brought to him on the 22nd and that he sent reports, Exhibits D and D1, to the Police and to the Magistrate on the very same day. No question has been put to him as to whether there were any floods between the place where the complainant was residing and the place where he was residing. The Jury might very well have disbelieved the story as to the theft, having regard to the delay in the presentation of the complaint. Then as regards identification, it is true that the 1st and 2nd witnesses for the prosecution said that the skins were those of the goat and of the kid which were stolen; but remembering that they saw the skins more than three

(1) 29 M. 91; 3 Cr. L. J. 371.

(2) 2 Ind. Cas. 417; 36 C. 629; 13 C. W. N. 757; 99 C. L. J. 638; 10 Cr. L. J. 32.

In re IRULA SADAYAN.

weeks after the theft, a Jury will not be wrong in holding that the identification is "suspicious." Then, the demeanour of the 3rd witness for the prosecution in the witness box seems to have impressed the Jury very badly.

Under these circumstances I do not think that the Jury were not justified in holding that the case against the accused has not been proved beyond reasonable doubt. It may be, as was argued before us, that they were not right in disbelieving the story for the prosecution merely because the accused was undefended. But every good Judge looks into the evidence given by one of the parties, when the other party was not in a position to engage a Pleader, with some degree of care; and, if the Jury thought that the evidence in this case should be scrutinised minutely on that ground, I cannot say that they were not acting rightly in doing so.

Reference has been made by the learned Public Prosecutor to the unsatisfactory explanation given by the accused for the possession of the skins. I do not think that circumstance should be taken into account as proving the theft or as facilitating the identification.

On the whole I have come to the conclusion that on the evidence let in for the prosecution, it is not safe to convict the accused; and as the opinion of the Jury coincides with this view of mine I think the accused is entitled to the benefit of the doubt and should be discharged from custody.

This reference coming on for final hearing under section 429 of the Code of Criminal Procedure, on the 26th February 1915, and the case having stood over for consideration till this day, the Court (Mr. Justice Aiyling) delivered the following

JUDGMENT.— The accused in this case was charged with the theft of a goat and a kid from the *pail* of the house of prosecution 1st witness on the night of 21st November 1914. The Jury found him "not guilty": but the Sessions Judge differed and referred the case to this Court under section 307 of the Code of Criminal Procedure. The result was another difference of opinion between the two learned Judges, before whom the referenee came for disposal: Spencer, J., being in favour of conviction, and Seshagiri Aiyar, J., of acquittal. The case has, therefore, been referred to me under section 429 of the Code of Criminal Procedure.

It will be clear from the above that the case, while simple in its outline, is one not easy of decision.

The case against the accused rests entirely on his alleged possession of the skins of the stolen goats within 24 hours of the theft. I see no reason to doubt that he was arrested by the Police on suspicion on the evening of 22nd November in the village of Manalurpet with two freshly flayed skins of a goat and kid in his possession. These skins are identified by prosecution witnesses Nos. 1 and 2 as those of the stolen goats: and the difficulty is whether this identification can be accepted. If it is, the accused's guilt might be presumed: for his explanation of how he came by them is unsupported by any evidence and is not probable. But it is absolutely necessary for the prosecution to establish that the skins found on the accused were those of goats recently stolen.

It may be that the prosecution has been over-confident and has not adduced all the evidence available in support of its case; but certainly on the record before me I should hesitate to accept the identification evidence. There is nothing impossible in prosecution witnesses Nos. 1 and 2 recognising and identifying the skins after so long an interval of three weeks. But, as pointed out by Seshagiri Aiyar, J., there are suspicious circumstances about the evidence of these witnesses, which have not been adequately explained. No complaint either to the Police or the village Magistrate was preferred for 13 days after the disappearance of the goats. There is nothing to corroborate 1st prosecution witness's statement that he went to the Tirukoilur Police station four days after the theft, and was sent away again "finding nothing." It would seem from the rest of the evidence that the skins should then have been at Tirukoilur open to identification The 1st prosecution witness's statement that he found nothing and was sent away by a Constable, is difficult to understand. No questions were asked of any other witness regarding the floods which are said to have prevented prosecution 1st witness from going to Tirukoilur earlier. Prosecution 2nd witness is a boy of 11, and both he and his father, prosecution 1st witness, are *pariah* coolies, whose evidence carries no great

weight. The owner of the goats (a Brahmin *ex-monigar* under whom prosecution 2nd witness works) has not been examined at all.

It seems to me that the evidence both as to identification and as to the theft itself is so suspicious that the Jury were justified in refusing to accept it.

I acquit the accused and direct his release.

Conviction set aside.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 891 OF 1914.
April 7, 1915.
Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shadi Lal.
DAULAT RAI—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *ss.* 409, 477A—*Debtor executing* hundi *in favour of Bank—Managing Director paying off his own debt in discounting* hundi, *whether amounts to criminal misappropriation—Falsification of document.*

A debtor of the Hindustan Bank executed in its favour certain *hundis* for Rs. 30,000 payable after six months. The Bank being in need of ready money the Managing Director, the accused in the case, asked the Co-operative Bank to discount the *hundis*. But the Bank refused to do so unless the Director cleared his own account with it. In order to secure ready money the accused brought forward his own son, who put in an application for a loan from the Hindustan Bank for the exact amount of the accused's debt to the Co-operative Bank. The accused sanctioned the loan as agent on the security of his own moneys in the hands of the Hindustan Bank and then cleared his debit balance with the Co-operative Bank. This transaction formed the subject of the charges under sections 409 and 477A of the Penal Code:

Held, (1) that the prosecution had failed to establish the charge of criminal misappropriation inasmuch as the accused, in his anxiety to secure ready money for his Bank, chose a method which could not be said to have injured it; [p. 76, col. 2.]

(2) that the prosecution had failed to prove that the application of the accused's son for loan and the accused's order thereon of sanction were really ante-dated and the charge of falsification of documents could not, therefore, be sustained. [p. 77, col. 1.]

Appeal from an order of the Magistrate, 1st Class, Multan, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 4th November 1914, convicting the appellant.

Messrs. *Kirkpatrick*, *Parker*, *Obedulla* and *Rughunath Sahai*, for the Appellant.

Mr. *Broadway* (Assistant Legal Remembrancer), for the Crown.

Mr. *M. N. Banerji*, for the Liquidator.

JUDGMENT.—In this case Daulat Rai, appellant, was sentenced by the first Class Magistrate, Multan, to five years' rigorous imprisonment and ten thousand rupees fine. The charge on which he was tried contains two heads, namely, misappropriation by him, as agent of the Hindustan Bank, Multan, of Rs. 8,180-4-9 (section 409, Indian Penal Code) and falsification of two documents in connection with that misappropriation (section 477A of the same Code.) He appeals against conviction and sentence, and we have heard the case argued at length and have carefully examined the record, with the result that in our opinion it cannot be safely said that either offence is proved to have been committed.

The facts of the case, so far as they are really important for us, are simple enough. In 1913 the public began to be suspicious as to the solvency of more than one Indian-managed Bank, and in consequence of withdrawals the cash in this Bank was in August low. Among the debtors of the Bank was one Maya Das, apparently a substantial trader, who owed the Bank at the moment some Rs. 60,000. Having no cash ready, he executed in favour of the Bank certain *hundis* for Rs. 30,000 payable after six months. The Co-operative Bank, Lahore, had previously accepted Maya Das's paper, so appellant approached that Bank and asked them to discount the *hundis*, so as to provide the Hindustan Bank with necessary ready money. At this time appellant owed some Rs. 8,000 to the Co-operative Bank on his private account, but had no money readily available to pay with; and that Bank, taking advantage of his position, refused to discount the aforesaid *hundis* except on the condition that he should clear his own account. Having Rs. 12,000 odd in fixed deposit in the Hindustan Bank, he might apparently have borrowed from that Bank, or might have used fixed deposit money which was falling due instead of renewing-or might have drawn on his hitherto untouched cash credit (as agent) of Rs. 25,000, but he did none of these things. Instead

he brought forward his own son Nainsukh, who, on August 11th 1913, put in an application for a loan from the Hindustan Bank of Rs. 8,180-4-9, the exact amount as on 15th August 1913 of appellant's debt to the Co-operative Bank. The loan was sanctioned by appellant as agent on the security of appellant's own aforesaid moneys in the hands of the Hindustan Bank, and with this money appellant cleared his debit balance with the Co-operative Bank. Then on 6th September 1913 Nainsukh handed in a pro-note for the amount of the loan.

The net result so far of the transaction may be stated thus: Rs. 30,000 of the debt due by Maya Das to the Hindustan Bank paid off by the *hundis*.

Discount charged by the Co-opertive Bank Rs. 1,350, and thus cash payment to appellant for the *hundis* Rs. 28, 650.

Of this sum Rs. 12,860 taken in the Lahore Branch of the Hindustan Bank, and Rs. 15,790 kept by appellant for the Multan Branch.

Of this Rs. 15,790, Rs. 7,609-10-3 credited in Multan Branch in Sundries Account, and Rs. 8,180-4-9 lent to Nainsukh as aforesaid.

This last transaction is the subject of the first head of the charge, and the documents denounced as false in the second head are Nainsukh's loan application bearing date 11th August 1913 and appellant's order thereon of sanction, bearing same date, both of which the prosecution contend were really written later and antedated.

We cannot help thinking that the prosecution have gone a little too far in insisting upon these charges. In paragraph 3 of the complaint it is even suggested that the crediting of Rs. 7,609-10-3 to "Sundries" was improper; but the evidence of Mr. Dignasse, and of Hari Chand, P. W. No. 7, late Manager of the Bank, shows that this was right enough. On 6th September the transfer to *hundis* account was duly made. Another thing in the complaint, which strikes us as not quite fair to the appellant, is that no mention is made of the apparently ample security for the loan to Nainsukh.

No lengthy discussion of the case is called for. Appellant's action can be fully accounted for by his solicitude for the Bank's interests. That he could only get money for the Bank from the Co-operative Bank on condition of clearing his own account is what he has always said—see his written statement before charge—and we think the allegation is sufficiently proved by the explicit statement on solemn affirmation of Mulk Raj, then Managing Director and now Liquidator of the Co-operative Bank. He was quite properly anxious that his Bank should get the Rs. 30,000 (or its "present value"), and out of the various ways indicated above of meeting the wish of the Co-operative Bank that he should clear his private account, he was right in choosing that way which was calculated least to injure his own Bank. He chose one way, which we are unable to see injured that Bank. He thought money was urgently wanted and he had to make a rapid election of methods. It is said he might have taken Maya Das's paper elsewhere for discount, but it was natural to deal with old correspondents, who had done the same business with his Bank before. And again he had to pay off the Co-operative Bank somehow, and it is not easy to see that the Hindustan Bank would have been any better off had he cashed the *hundis* elsewhere and then taken out of the cash balance in the Hindustan Bank Rs. 8,000 odd of his own (or as a loan against his cash credit aforesaid) to pay to the Co-operative Bank. Ready money was the important thing just then, and either plan necessarily involved the loss to the Bank of this Rs. 8,000 as ready money.

These things being so, we hardly see the motive for falsification of Exhibit P 2; and we are not at all clear that its antedating has been proved. The only grounds Mr. Broadway can indicate for the antedating theory are that on 11th August the exact amount of appellant's debt of Rs. 8,000 odd could not be known at Multan and was not as a fact known; and the non-entry of the application in the loans applications Register. In connection with the first ground he refers us to the evidence of Hari Chand, P. W. No. 7 aforesaid, where he says that, when appellant returned from Lahore, he said he had not the exact figures from Lahore and when they came the pro-note should be executed. It must be borne in mind that the witness was testifying more than a year after the event, and may have forgotten

the exact facts, *e. g.*, the appellant's instructions may have had reference to the entering up, after advice received from Lahore, of the whole transaction in detail. We see no real difficulty in believing that appellant, when in Lahore, ascertained what his debt would be on 15th August, promised to pay on that day and returned to Multan to arrange. As to the latter ground it is in evidence that local applications for loans were never entered in the Register, but only applications through out-station branches. Grounds like these cannot be taken as sufficient in the face of the facts that in the prosecution evidence there is nothing about antedating, and that P. W. No. 7 plainly says Exhibit P2 reached him on 11th August.

Mr. Kirkpatrick has argued the matter of non-charge against appellant of interest from 11th August to 6th September 1913 on the Rs. 8,180-4-9 kept back, but Mr. Broadway has not pressed this point; and we need only say that we can see no indication of dishonesty or fraud on the part of appellant here. The time for debiting interest had not come up to the date of the Liquidators taking over charge. If they have failed to charge interest for those weeks, how is this a crime of applicant's?

For these reasons we accept this appeal and acquit the appellant. Fine to be refunded.

Appeal accepted.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 216 OF 1915.

March 26, 1915.

Present:—Mr. Justice Tudball.

ZORAWAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 122—*Sureties—Report by Police as to fitness of sureties, admissibility of.*

A Magistrate called for a report from the Sub-Inspector of Police as well as from the Tahsildar as to the fitness of particular persons to act as sureties in a case: the Tahsildar reported in the affirmative and the Sub Inspector in the negative. The Magistrate accepting the report of the Police Sub-Inspector declined to accept the sureties:

Held, that the report of the Police Officer was not admissible in evidence and that it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. [p. 78, col. 1.]

FACTS appear from the following Criminal Reference made by the Sessions Judge of Agra:

REFERRING ORDER.

Zorawar was ordered by a Deputy Magistrate of the Muttra District to furnish security for good behaviour under section 118 of the Criminal Procedure Code. Two persons offered themselves as sureties. The Deputy Magistrate called for a report from the Tehsildar as to the sufficiency of the security offered, and also as to the fitness of these persons to act as sureties. The Tehsildar recorded the evidence of six witnesses who all stated that these two persons were men of position and respectability and were in every way fit to act as sureties and he also found that the security offered by them was sufficient. The Deputy Magistrate also called for a report from the Sub-Inspector of the Police circle in which Zorawar lives. The Sub-Inspector reported that one of the persons was a nephew of Zorawar and that the other appeared to be associated with Zorawar in his criminal parctices. The Deputy Magistrate thereupon, ignoring the report of the Tehilsdar and accepting the report of the Sub-Inspector, passed an order declining to accept the security offered. It is clear that the procedure of the Deputy Magistrate was illegal. He should not have come to a decision as to the fitness or unfitness of the persons to act as sureties merely on a one-sided report of the Sub-Inspector, which was not evidence. It was for the Magistrate himself to make enquiries as to their fitness. The Magistrate appears to be unaware of the ruling of the Allahabad High Court, *Emperor* v. *Pirthipal Singh* (1), which was followed in the cases of *Emperor* v. *Tota* (2) and *Emperor* v. *Balwant* (3).

JUDGMENT.—In so far as the the Magistrate's order refusing to accept the sureties is concerned, that order must be set aside. It is so obviously based upon the report of

(1) A. W. N. (1898) 154.
(2) 25 A. 272; A. W. N. (1903) 36.
(3) 27 A. 293; 1 A. L. J. 601; A. W. N. (1904) 231; 1 Cr. L. J. 912.

In re CHOITANO RANTO.

the Police, which is no evidence in the matter. In the evidence on the record there is no reason whatsoever to be discovered why the sureties should not be accepted. If any information was derived from the Police report, it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. I, therefore, accept the reference. I set aside the order of the Magistrate and direct that the sureties offered be accepted, the necessary bond be taken and Zorawar released from prison. In regard to what the learned Sessions Judge has said in reference to alterations in the record of the case, I express no opinion, nor is it necessary for me to do so.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL APPEALS NOS. 123 AND 124 OF 1915.

April 19, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Seshagiri Aiyar.

In re CHOITANO RANTO AND OTHERS—ACCUSED—APPELLANTS.

Penal Code (Act XLV of 1860), ss. 148, 149—Members of unlawful assembly—Only one member possessed of gun—Persons not in possession of any gun, offence committed by—Several offences—Acquittal of some of them—Sentence, reduction of.

Where of the several persons charged with rioting armed with a deadly weapon only one is proved to have been possessed of a gun, it is illegal to convict others who had no such dangerous weapon of an offence under section 149 of the Indian Penal Code.

Sabir v. *Queen-Empress*, 22 C. 276, followed.

Where there has been an acquittal of the accused of some of the offences of which they were convicted, there must be a proportionate reduction in the sentences also.

Appeals against an order of the Court of Session of the Vizagapatam Agency Division, in Case No. 32 of the Calendar for 1914.

Dr. *S. Swaminadhan* and *Mr. V. Ramesam*, for the Appellants.

Mr. *P. R. Grant*, for the Government.

JUDGMENT.—The first objection to the lower Court's decision taken by Dr. Swaminadhan is that all the accused before us have been convicted of offences punishable under section 148, Indian Penal Code, though only the 2nd accused is shown to have had a gun. The convictions were apparently based on an application of section 149. But *Sabir* v. *Queen-Empress* (1) is against that view of the law; and we have been shown no reason for dissent from the opinion of the Calcutta High Court. The convictions under section 148 of all except the 2nd accused are set aside.

Next it is urged that the 21st accused was really engaged in rescuing the Head Constable, not in dragging or threatening him. That was not alleged at the trial and there is nothing to support it.

Mr. Ramesam argues first that the 3rd accused is not shown to have taken any effective part in the riot and is unlikely to have done so, since he went with the Police to the search of the 1st accused's house. The evidence as to his conduct, which was such as to render him conspicious, is however clear, and we must confirm his conviction. We return to his sentence.

The case of the 19th accused seems to us doubtful. For the 2nd prosecution witness, the Head Constable, whom he is alleged to have attacked, did not recognise him at the identification parade. We give him the benefit of the doubt, which it entailed, and acquit him. He must be released.

As regards sentences, we give weight to the fact that the 1st accused is over 60 and that we can find no valid reason for treating the 3rd accused's case as a special case and we also make a reduction on account of the acquittals under section 148. In the result we confirm the conviction and sentence on the 2nd accused. We reduce the 1st accused's sentence to two years, 3rd to 10th accused's sentence to nine months, 11th to 13th accused's sentence to five months, 18th accused's sentence to 18 months, and 21st and 22nd accused's sentence to 13 months. We do not interfere with the sentences of fine. The appeals are allowed to this extent and dismissed in other respects.

Appeals partly allowed; Sentences modified.

(1) 22 C. 276.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATIONS NOS. 178 AND 179 OF 1914.

November 5, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

LILADHAR UMERSI AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Bombay Prevention of Gambling Act (Bom. Act IV of 1887), ss. 6, 7, 10—Evidence Act (I of 1872), s. 125—Criminal Procedure Code (Act V of 1898), s. 342—Complaint on which special warrant issued—Right of accused to have it produced at trial—Extent of privileged nature of such complaint—Power of Magistrate to examine as witnesses persons challaned by Police as accused persons under Gambling Act—Special procedure—General procedure.

A Magistrate has power to examine as witnesses persons arrested and brought before him under section 6 (*b*). The whole procedure of the Gambling Act being a special procedure overrides the general law of procedure enacted in section 342, Criminal Procedure Code, and whenever it is inconsistent with it. [p. 80, col. 2.]

Emperor v. *Kaitan Duming Fernad*, 31 B. 438 at p. 445; 9 Bom. L. R. 695; 6 Cr. L. J. 60; followed.

Per *Pratt, J. C.* (*Fawcett, A. J. C. dissenting*). A complaint under section 6 of the Bombay Prevention of Gambling Act stands on the same footing as a first information of a cognizable offence recorded under section 154, Criminal Procedure Code, or complaint of a non-cognizable offence under section 200, Criminal Procedure Code, and although it is not a necessary part of the evidence for the prosecution, yet it is evidence and the accused have a right to call for it, and if the warrants are challenged, their production would be necessary. [p. 80, col. 1.]

Section 125 of the Indian Evidence Act rests upon public policy and it protects the name of a spy or secret informant, not the nature of the information and it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings. [p. 80, col. 1.]

Per *Fawcett, A. J. C.*—The Bombay Act requires the complaint to be on oath merely as an additional guarantee of the truth of the complaint. It is not intended to imply that the complaint is a document on which proceedings against any persons that may be arrested under the warrant are based. These proceedings are based on the fact of the arrest of the accused and their production before the Magistrate and not on the complaint which is merely the basis of the warrant which leads to their arrest. [p. 84, cols. 1 & 2.]

The rule stated in section 125, Evidence Act, is clearly applicable and appropriate in regard to gambling cases and, therefore, a Magistrate is perfectly right in refusing to order the production of the complaint under section 6 of the Bombay Act (IV of 1887). [p. 82, col. 1.]

Mr. *Wadhoomal Oodharam*, for the Applicants.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.

PRATT, J. C.—These are applications in revision made by two convicts, who were accused No. 12 and accused No. 16 before the Magistrate. Accused No. 12, Liladhar, has been convicted under section 4 of the Bombay Gambling Act and sentenced to rigorous imprisonment for one month. Accused No. 16 has been convicted under section 5 and sentenced to rigorous imprisonment for three months.

The two points raised in the applications are (1) that the Magistrate did not bring on to the record the complaint on which the special warrant was issued as he considered it to be a privileged document, and that the accused were, therefore, unable to show that the house referred to in the complaint was not that described in the warrant, and that, therefore, the presumption under section 7 of the Gambling Act did not arise, and (2) that the Magistrate had no power to examine as witnesses two persons, Abdul Satar and, Rama who had been arrested by the Police in the house and were in the position of accused persons.

Now the offences made punishable under the Bombay Gambling Act, 1887, seem to me to occupy a position intermediate between the offences classed as cognizable and non-cognizable by the Code of Criminal Procedure. These are non-cognizable offences because it would not be safe to entrust the Police with authority to enter and search private houses on suspicion of gaming or on an information for the truth of which there is no guarantee. On the other hand, they are not on the same footing as non-cognizable offences for it would be impossible in a complaint before a Magistrate to apply for process against any particular person, for that person would have finished his gaming and have left the premises long before the process could be served. The Act, therefore, lays down a special

procedure. The informant has to make a complaint on oath as a guarantee of the truth of his information. The complaint is directed against the house, room or place and is made before a Magistrate of the first Class or a specially empowered Police Officer of rank. A special warrant then issues and the offenders are searched through the house, room or place that is searched.

The prosecution begins with the complaint on oath referred to in section 6. That complaint stands on the same footing as a first information of a cognizable offence recorded under section 154, Criminal Procedure Code, or complaint of a non-cognizable offence under section 200, Criminal Procedure Code. If in these two cases the first information and complaint are used as evidence, I do not see any reason for excluding the complaint made under section 6 of the Gambling Act. Section 125 of the Indian Evidence Act rests upon public policy. It protects the name of a spy or secret informant, not the nature of the information. And it has no application whatever to an informant who lays a sworn information and thereby initiates criminal proceedings.

Public policy rather requires that the man who lodges an information, which is a complaint, should undertake responsibility for his action. This will in no way interfere with the detection of gambling cases. A Police spy who does not wish his name to be known will refrain from giving his information on oath. But on that information it would be quite easy for the Police to verify the fact and secure a sworn complaint. No form of special warrant is given in the Gambling Act, but the form given in the schedule to the English Act 8 & 9 Vict., c. 109, expressly recites the name of the person on whose sworn information the warrant was issued.

I still adhere to the opinion expressed in *Abdulla* v. *Emperor* (1), that the complaint is not a necessary part of the evidence for the prosecution. But it is evidence and the accused have a right to call for it and if the warrants were challenged, its production would be necessary, for, unless the warrant had been issued on a complaint sworn before the specified authorities the presumption under section 7 would not arise.

(1) 9 Ind. Cas. 895; 12 Cr. L. J. 149; 5 S. L. R. 40

The Magistrate was, therefore, in my opinion, wrong in refusing to bring the complaint on the record, but I agree that this irregularity does not affect the case. Even if there were no presumption under section 7, the convictions would stand on the evidence of Abdul Satar and Rama. They state that accused No. 16 was paid for the use of the house and that he kept watch outside, that '*nal*' was taken and that accused No. 12 was a sharer in the business of gambling.

I consider that the evidence of these two witnesses is admissible. Section 10 implies that the Magistrate has power to examine as witnesses persons arrested and brought before him under section 6 (*b*). The section can apply to no other but persons so arrested. The whole procedure of the Gambling Act is a special procedure and overrides the general law of procedure enacted in section 342, Criminal Procedure Code, whenever it is inconsistent with it.

The corresponding section of the English Act contains a provision even more drastic than section 10, for the Justice of the Peace is empowered to compel the persons arrested to take an oath and give evidence as to the unlawful gaming.

I would, therefore, confirm the convictions of both the applicants, accused No. 12, Liladhar, and accused No. 16, Motilal. I would also confirm the sentence of Liladhar, but as there is no previous conviction against accused No. 16, Motilal, I think the maximum punishment is not asked for. I would reduce the sentence in his case to rigorous imprisonment for one month.

FAWCETT, A. J. C.—The Magistrate in convicting the applicant, Motilal, under section 4 of the Bombay Prevention of Gambling Act, 1887, has mainly relied on the evidence of Abdul Satar and Rama against him. These two persons were among those arrested and brought before the Magistrate in accordance with section 6 (*b*) of that Act, and it is contended that they were accused persons and their evidence was inadmissible, as they had neither been tried and convicted or acquitted, nor had the prosecution been withdrawn against them under section 494 of the Criminal Procedure Code. It appears from the proceedings that in the Police report sent with the accused it was requested that Abdul Satar should be examined as a witness

under section 10 of the Act, and the Magistrate recorded that both he and Rama were "struck off" under that section. The point, then, for determination is whether the provisions of that section enable the Magistrate to examine any of the persons brought before him in accordance with section 6 (*b*) of the Act or whether all such persons must be treated as accused persons, who cannot be examined unless they have been tried or the prosecution has been withdrawn against them.

In my opinion the former is the correct conclusion. Section 10 follows with some verbal changes the provisions of section 3 of the Gambling Act, 1845, and 9 Vict. c., 109, and similar provisions are contained in the Gaming House Act, 1854, (17 and 18 Vict. c. 38) where, however, section 3 of the Act of 1845 is split into two sections 5 and 6 (with some additional provisions). Section 5 expressly enacts that "it shall be lawful for the Justices before whom any persons shall be brought who have been found in any house, room, or place entered in pursuance of any authority granted under the provisions of the said Act, 8 & 9 Vict. c. 109, to require any of such persons to be examined on oath and give evidence touching any unlawful gaming in such house, room, or place" etc. Section 6 contains the remaining provisions of section 3 of the Act of 1845. The provisions of section 5 of the Gaming Houses Act, 1854, may in these circumstances clearly be referred to as a "parliamentary exposition" of the meaning of the first part of section 3 of the Act of 1845, on which the provisions of section 10 of the Bombay Act are based. *Cf.* Hard-Castle on Statutory Law, 3rd Edition, page 155. But even without this aid to the interpretation of the earlier enactment, the power to examine as a witness any person found in an alleged common gaming-house is clearly implied in the words "who shall be examined as a witness by or before a Magistrate.....touching such gaming." The maxim "*ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest*" applies to the case. In my opinion, therefore, section 10 confers on the Magistrate power to examine as witnesses any of the persons who may be brought before him in accordance with section 6 (*b*), so long as it does on the trial of any charge against the owner, keeper or occupier, or other person having the care or management of any common gaming-house. In this case Abdul Satar and Rama were examined on such a charge against the applicant, and their evidence against him is quite admissible, inspite of the provisions of the Criminal Procedure Code to the contrary. As said in *Emperor* v. *Kaitan Duming Fernad*(2): "Where the Gaming Act has provided for the manner, or place of investigating or inquiring into any offence under it, its provisions must prevail and the Criminal Procedure Code must give way." It is simply an instance of the ordinary rule "*generalia specialibus non derogant.*" The legislation contained in the Bombay Prevention of Gambling Act, 1887, is based on analogous English legisation; and sections 7 and 10, which go against the provisions of ordinary law, are special provisions enacted in order to get over the difficulty of obtaining evidence against keepers and frequenters of gaming houses. Thus 25 Geo. 2, c. 36, s. 8 recites, "And whereas, by reason of the many subtle and crafty contrivances of persons keeping bawdy houses, gaming-houses, or other disorderly houses, it is difficult to prove who is the real owner or keeper thereof, by which means many notorious offenders have escaped punishment; be it enacted," etc. Again the preamble of the Gaming Houses Act, 1854, which contains the provisions on which section 10 of Bombay Act IV of 1887 is based, recites that "the keepers of common gaming-houses contrive, by fortifying the entrances to such houses or by other means, to keep out the officers authorised to enter the same until the instruments of gaming have been removed or destroyed, so that no sufficient evidence can be obtained to convict the offenders, who are thereby encouraged to persist in the violation of the law."

The evidence of Abdul Satar and Rama was, therefore, admissible on the charge against the applicant, Motilal; and the objection raised is, therefore, no sufficient ground for interfering with the Magistrate's finding, so far as it is based on that evidence. Their evidence taken in conjunction with the other circumstances mentioned by the Magistrate, which corroborate that evidence, supplies sufficient legal material for his finding that Motilal did use the house for the purpose of a common gaming-house.

(2) 31 B. 438 at p. 445 9 Bom. L. R. 695; 6 Cr. L. J. 60.

LILADHAR UMERSI *v.* EMPEROR.

The applicant has been convicted under section 4 and not section 5 of the Act. It is immaterial, therefore, whether he was present or not when the house was raided. The evidence of Abdul Satar and Rama that he was watching outside the house is, consequently, no obstacle to his conviction. He was in fact assisting in conducting the business, within the meaning of clause (*c*) of section 4.

It is next objected that the Magistrate erred in not allowing the defence access to the complaint, on which the special warrant under section 6 was issued. The allegation is that, if it had been produced, the defence might have been able to show that the house complained against was not the one actually raided, but another. On the other hand the Public Prosecutor asserts that the whole object of this request was to ascertain who was the informer. Whichever may have been the actuating motive of the request, I can see no sufficient ground for not giving full operation to the provisions of section 125 of the Evidence Act, which is a general provision applicable as much to cases under the Gambling Act as any other cases. I can find nothing in that Act which either expressly or impliedly overrides the provisions of section 125. I do not think the mere fact that under section 5 the complaint must be on oath implies that it must be disclosed, in spite of the provisions of section 125 of the Evidence Act. I am aware that it was ruled otherwise in Criminal Ruling No. 5 of the Sadar Court for June 1902, but I would respectfully dissent from the view there taken. That view is based on the proposition that the complaint under section 6 is a formal complaint used as evidence against an accused person in a criminal proceeding, to which the provisions of section 125 of the Evidence Act cannot apply. It is said to be used as evidence in this way, because the provisions of section 7, involving a departure from the ordinary principle of law which imposes on the prosecution the duty of proving all essential elements of an offence, are based on the presumption that *prima facie* proof has already been furnished in a judicial, though *ex parte*, proceeding of the fact that the house is a common gaming-house within the definition, and "the proper construction of section 7 of the Act is that the warrant issued is *prima facie* evidence that the house is a common gaming-house." But the presumption allowed by the section is not based on the mere issue of the warrant or on the complaint and inquiry under section 6. It is based on evidence that when the house was entered in pursuance of the warrant, cards, dice or other instruments of gaming were found in the house. Without such evidence, however strong might be the grounds on which the warrant was issued, the presumption in question cannot arise. The warrant merely enables the house to be unexpectedly entered, so as to obtain evidence; it is not itself any evidence of the truth of the allegation that the house entered is a common gaming-house. Nor can the complaint made under section 6 be in any way used as evidence at the trial, except perhaps to corroborate or discredit the person who actually made it, should he be called as a witness. I, therefore, entirely disagree with the grounds on which it is said that section 125, Evidence Act, does not apply to such a complaint.

The rule embodied in section 125, Evidence Act, is one based on public policy. As said by Lord Chief Justice Eye in the leading case of *Rex* v. *Hardy* (3), (cited in Taylor's Law of Evidence, 5th Edition, Volume 1, page 830): "It is perfectly right that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained on account of its importance to the public for the detection of the crimes, that those persons, who are the channel by means of which detection is made, should not be unnecessarily disclosed." In *Marks* v. *Beyfus* (4), Lord Esher, M. R., says: "I do not say it is a rule which can never be departed from: if upon the trial of a prisoner the Judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man cannot be condemned when his innocence can be proved, is the policy that must prevail. But except in

(3) 24 St. Tr. 751.

(4) (1890) 25 Q. B. D. 494 at p. 498; 59 L. J. Q. B. 479.

that case, *this rule of public policy is not a matter of discretion: it is a rule of law* and as such should be applied by the Judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not." Accordingly (page 500) he held that even if the Director of Public Prosecutions had been willing to answer the questions put to him as to the persons from whom he had received information and the nature of the information received, the Judge ought not to have allowed him to do so. A similar view was taken by Wills, J., in *Hennessy* v. *Wright* (5), and the learned authors Messrs. Woodroffe and Ameer Ali, in their Law of Evidence, 5th Edition, page 811, are of opinion that, upon these authorities and upon a consideration of the foundation of the rule, the protection afforded by this section 125 does not depend upon a claim being made and that it is the duty of the Judges, apart from objection taken, to exclude the evidence. I am content to follow this opinion, which is supported by such good authority as well as by the second proviso to section 165, Evidence Act; and I think it is a rule which is, at any rate, clearly appropriate in regard to gambling cases, where an informer will naturally incur considerable odium. If he can be ascertained in all such cases by the simple expedient of making some excuse for the production of the complaint on which the warrant was issued, the obvious result will be that informers will be less ready to come forward and offences under the Act will be more difficult to detect than they are even as it is. A mere suggestion that the complaint would show that the house raided was not the one referred to in the complaint is not sufficient to justify any departure from the rule embodied in section 125, Evidence Act, and I think the Magistrate was perfectly right in refusing to order the production of the complaint.

Even if it had been urged that there had been no complaint or that it was one not *on oath*, and so the warrant was not a legal one under section 6 of the Act, still I do not think that the complaint should, therefore, necessarily be put on the record. In my opinion, in view of section 125, Evidence Act, this should be avoided. The officer who issued the warrant could be examined on this point without the informer's name being disclosed, and the Court could, if necessary, inspect the complaint under section 162, Evidence Act. In any case I think it should not be put on the record without giving an opportunity to the Police Officer or Magistrate before whom the information was laid to object to its production under section 125, Evidence Act.

In support of the view taken above, I would also cite the remarks of Field, J., in *Blake* v. *Beech* (6). That was a case where a house was entered and searched on information of its being used as a common gaming-house under section 3 of the Gaming Act, 1845, (8 & 9 Vict., c. 109), and the question was whether a separate information (apart from that on which the warrant was issued) should have been laid against the accused. Field, J., in answering this in the negative says (at page 115):—"The Statute in question in this case does in fact, require that the warrant to search the premises and apprehend the persons found therein, which is to be granted upon an *ex parte* application, shall be preceded by a complaint upon oath, as is almost, if not quite, invariably the case whenever a Magistrate is required upon an *ex parte* application to issue a warrant of apprehension. But in the present instance, inasmuch as the offence to be dealt with is one, like that of gaming, usually committed in secret and under circumstances rendering it ordinarily difficult to say beforehand what the precise offence is, and who are the persons who may be found committing it, the Statute seems to me to substitute, for the ordinarily requisite statement in an information or complaint of the specific person and offence, the general allegation of a suspicion that particular premises are used for the purpose of committing the offence, in order that by means of the entry and seizure of cards and lists, it may be discovered whether any and what offence has been committed, and who are the persons, if any, committing it." It is true that in that particular case the majority of the Court held that the accused's conviction was wrong, but that was

(5) 21 Q. B. D. 509; 57 L. J. Q. B. D. 530; 59 L. T. 323; 53 J. P. 52.

(6) (1876) 45 L.J.M.C. 111; 1 Ex. D. 320; 34 L.T. 764.

based (1) on the fact that the accused was charged with a different offence to that alleged in the information on which the warrant was issued and (2) on certain sections of the Betting Act of 1853 (16 & 17 Vict., c. 119), the Act under which the accused was charged, which showed that proceedings by information and summons were contemplated. Neither of these considerations apply to the present case. And it may be noticed that section 10 of the Bombay Act in reproducing the terms of section 9 of the English Act of 1845 is careful to substitute the words "on the trial of any charge" for the words "on the trial of any indictment or information," which might support the view that the information was the *foundation* of the proceedings, and should, therefore, be before the Court. Under clause (*b*) of section 6 of the Bombay Act, the Police Officer authorized by the especial warrant under that section is empowered to bring before a Magistrate all persons whom he finds in the house entered and searched and on their appearance before the Magistrate the latter has jurisdiction to try them in accordance with the ordinary procedure for the trial of summons cases, without any regular complaint. Field, J., in the case of *Blake* v. *Beech* (6) (see at page 116) points out that the same can be done under the analogous English Law; but the case is stronger under the Bombay Act by reason of the substitution of the word 'charge' in section 10 already referred to.

The fact that under section 6 the complaint has to be *on oath* does not, in my opinion, affect the question at issue. This merely follows the English Law, which requires the information to be on oath before a warrant is issued: and the reason is that this was the ordinary rule in the case of warrants, as stated by Field, J., in the remarks already cited. But an exception is made in section 6 of the English Act of 1845, under which in London a warrant can issue on the mere report in writing by a Police Superintendent that there are good grounds for believing, and that he does believe, a house to be kept as a common gaming-house. It is quite clear that the Bombay Act requires the complaint to be on oath merely as an additional guarantee of the truth of the complaint, and that it is not intended to imply that the complaint is a document on which proceedings against any persons that may be arrested under the warrant are based. These proceedings are based on the fact of their arrest and production before the Magistrate, and not on the complaint which merely was the basis of the warrant which led to their arrest.

Nor am I impressed by the argument that section 7 of the Act requires that the persons should have been found in any house, etc., "under warrant issued under *the* provisions of the last preceding section." In order to satisfy this condition of the circumstances which justify the presumption allowed by section 7, it is, in my opinion, quite sufficient for the warrant to be produced before the Court. As I have already pointed out, this is not the main circumstance which justifies the presumption, and if any question arises as to the complaint not having been made *on oath* or the warrant being not in conformity with the complaint, the Court can satisfy itself on the point without infringing the provisions of section 125 of the Evidence Act.

No doubt the form of warrant prescribed by the English Act of 1845 expressly recites the name of the person upon whose sworn information the warrant is issued; but the Bombay Gambling Act contains no corresponding provision, and in the somewhat analogous case of a warrant under section 98 of the Criminal Procedure Code the form of warrant contained in No. IX of Schedule V, though it recites the fact of the required information being laid, omits all references to the informant's name.

In *Abdullah* v. *Emperor* (1), it has been held that the complaint on oath is not a *necessary* part of the evidence for the prosecution. For the reasons given above, I would go further and say that it is not a *proper* part of that evidence, and that (in accordance with the rule adopted in England) its production should not be allowed by the Court, unless it is shown that this is necessary or right for the purpose of establishing the prisoner's innccence. In this particular case the maxim "*omnia rite esse acta præumuntur*" justifies the Court in presuming that th

warrant followed the complaint in its description of the house alleged to be used as a common gaming-house; and a mere suggestion *contra* is no good ground for acquiring the production of the complaint.

Even, however, if the Magistrate committed an error in not requiring its production, this would be no good reason for our interference in revision, unless the error occasioned a failure of justice (section 537, Criminal Procedure Code), and there is no ground whatever for saying this is the case.

I would, therefore, confirm the conviction in the case of the applicant Motilal as well as in that of the applicant Liladhar, the objections to whose conviction are based on similar grounds. The sentence of one month's rigorous imprisonment imposed on Liladhar is confirmed, but for the reasons given in the learned Judicial Commissioner's judgment the sentence of three months' rigorous imprisonment imposed on Motilal is reduced to one month.

Convictions upheld; Sentence modified.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 678 OF 1914.
CRIMINAL REVISION PETITION No. 572 OF 1914.
March 26, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re B. DASAPPA—ACCUSED No. 1—PETITIONER.

Penal Code (Act XLV of 1860), ss. 217, 411—Police Officer retaining property found in search for theft—Property not part of stolen property—Offence—Criminal Procedure Code (Act V of 1898), s. 523—Failure to report.

A Police constable, who retained for himself a piece of gold found in a search for stolen property but not proved to be part of the stolen property and failed to report his possession to his superior officers under section 523 of the Code of Criminal Procedure, is guilty of an offence under section 217 of the Penal Code. [p. 86, col. 1.]

Bomanjee Cowasjee's case, 34 I. A. 55; 11 C. W. N. 370; 5 C. L. J. 123; 9 Bom. L. R. 3; 17 M. L. J. 67 (P. C.); 2 M. L. T. 96; 34 C. 129; 5 Cr. L. J. 50, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint Magistrate of Coondapur, in Criminal Appeal No. 53 of 1914, preferred against that of the Tahsildar, second Class Magistrate of Udipi, in Calendar Case No. 34 of 1914.

Mr. *B. Sitarama Rao*, for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—The petitioner has been convicted under sections 217 and 411 of the Indian Penal Code. The grounds urged in revision are:—

(1) that there is no evidence that the property was stolen property, and

(2) that the accused did not disobey any direction of the law.

Both Courts found that the petitioner who was a Police constable, having received a complaint of theft, held an investigation on his own responsibility (without reporting the fact that he received a complaint to his superior officers), got possession of a piece of gold (said to be a portion of the stolen property) and only delivered it to the Sub-Inspector when he was about to be searched.

There can be little doubt that the accused took possession of a bit of gold during his investigation and the first question is, whether it was part of the stolen *kasitali*. Kittachari, P. W. No. 2, who was accused of the theft denies that the piece, M. O. No. 1 which was found on the petitioner was part of the stolen property. He retracts the statements in Exhibit D and having regard to the ruling of the Privy Council in *Bomanjee Cowasjee's* case (1), it is difficult to see how Exhibit D can be used for any purpose except to contradict the evidence of the witness. The retracted statement, Exhibit D, cannot be taken to represent the truth and a conviction based thereon. There is nothing in the prosecution evidence to prove that the piece of gold found in the possession of the accused was part of the stolen *kasitali*. The second Class Magistrate speaks in paragraph 3 of admissions made by the accused, that P. W. No. 2 had stolen a *kanti* and melted it. Defects in the prosecution evidence cannot be supplied by admissions by the accused during the

(1) 34 I. A. 55; 11 C. W. N. 370; 5 C. L. J. 123; 9 Bom. L. R. 3; 17 M. L. J. 67 (P. C.; 2 M. L. T. 96; 34 C. 129; 5 Cr. L. J. 50.

course of the argument, and in the present case the admissions referred to in paragraph 3 of the Magistrate's judgment do not go to show that the piece M. O. 1, which nobody identifies as part of the *kasitali* was stolen property. The conviction under section 411 cannot stand.

As regards the conviction under section 217, I am of opinion that the accused, whose duty it was, under section 523 of the Criminal Procedure Code, to see that the recovery of M. O. 1 was reported to the Magistrate either directly by himself or through his superior officers, deliberately failed to do so. It is clear that he did not report the recovery of M. O. 1 which he got from P. W. No. 3 during the search. The evidence in the case and the conduct of the petitioner show that his object was to screen the culprit and appropriate the piece of gold found.

I set aside the conviction under section 411, but confirm the conviction under section 217 and reduce the sentence to three months' rigorous imprisonment.

Conviction partly set aside;
Sentence reduced.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 890 OF 1914.
April 3, 1915.
Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shadi Lal.
DAULAT RAI—CONVICT—APPELLANT
versus
EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 409—Managing Director of Bank borrowing money in his own name—Subsequent transfer of liability to Bank, whether amounts to criminal breach of trust—Adequacy of motive.

The accused, the Managing Director of the Hindustan Bank, executed in favour of the Amritsar Bank, four *hundis* for an aggregate sum of Rs. 5,000 payable six months after date and after deducting the discount he received the balance Rs. 4,772-11 and got it credited in his floating account with the Hindustan Bank. Some months before due date the accused caused entries to be made in the books of the Hindustan Bank by which the liability for re-payment on the date of maturity of the *hundis* was transferred from himself to the Hindustan Bank:

Held, (1) that the prosecution had failed to prove that the accused was guilty of the offence of criminal breach of trust; [p. 87, cols. 1 & 2.]

(2) that the motive for the crime was under the circumstances of the case wholly inadequate; [p. 87, col. 2.]

(3) that the evidence on the record led to the inference that the loan was contracted *ab initio* for the Hindustan Bank for meeting immediate or prospective demands. [p. 87, col. 2; p. 88, col. 1.]

Appeal from an order of the Magistrate, first Class, Multan, exercising enhanced powers under section 30 of the Criminal Procedure Code, dated the 4th November 1914, convicting the appellant.

Messrs. *Kirkpatrick*, *Parker*, *Obedulla* and *Rughunath Sahai*, for the Appellant.

Mr. *Broadway* (Assistant Legal Remembrancer), for the Crown.

Mr. *M. N. Banerji*, for the Liquidator.

JUDGMENT.—The appellant, Daulat Rai, who was the Managing Director of the Hindustan Bank, Limited, Multan, now being wound up by the Court, was prosecuted at the instance of the Liquidator of the Bank for committing criminal breach of trust in respect of the money of the Bank entrusted to him in his aforesaid capacity. The Magistrate found the accused guilty of the offence with which he was charged, and sentenced him under section 409, Indian Penal Code, to suffer rigorous imprisonment for five years and to pay a fine of Rs. 5,000. Against this order of conviction the convict has preferred through Counsel an appeal to this Court, and after hearing Mr. Kirkpatrick for the appellant and Mr. Broadway for the Crown, and examining the evidence on the record and the law bearing on the subject, we have arrived at the conclusion that the guilt of the appellant has not been established and that this appeal must be accepted.

The main facts of the case do not admit of much dispute and may be stated in a few words. It appears that Daulat Rai, either in his personal capacity as alleged by the prosecution, or in his capacity as the Managing Director of the Bank, as urged by the defence, was in a great need of money in the beginning of 1913, that, on the 24th of January 1913, he executed in favour of the Amritsar Bank, Limited, four *hundis* for an aggregate sum of Rs. 5,000, payable six months after date, and that after deducting the discount, amounting to Rs. 227-5, he received the balance, Rs. 4,772-11, on different dates from the said Bank. It is quite clear

that this amount was credited to Daulat Rai in his floating account with the Hindustan Bank on the following dates:—

		Rs.	a.	p.
(1)	On 31st January 1913. ...	1,528	0	0
(2)	On 10th February 1913 ...	1,528	0	0
(4)	On 12th February 1913 ...	1,716	11	0

The due date of the *hundis* was the 24th July 1913, but some months before that date Daulat Rai caused on the 2nd of May 1913 entries to be made in the books of the Hindustan Bank by which the above-mentioned sum of Rs. 4,772-11-0 was debited to him in his account and Rs. 5,000 were credited to the Amritsar Bank. The result of these entries was that the liability for payment of Rs. 5,000 on the date of the maturity of the *hundis* to the Amritsar Bank was transferred from Daulat Rai to the Hindustan Bank and that the latter in lieu thereof debited Rs. 4,772-11-0 to Daulat Rai in his account. The prosecution contend that this transfer of liability caused the Hindustan Bank a loss, and Daulat Rai a gain, of Rs. 227-5-0, and that as this action of the latter was dishonest, he, as the trustee of the funds of the Bank, has been guilty of the offence of criminal breach of trust. We may at once correct a mistake made by the prosecution by pointing out that as the loan transaction was transferred nearly three months before the due date of the *hundis*, the loss, if any, resulting to the Hindustan Bank amounted, not to the sum specified above, but to that sum *minus* the discount for the period from the 2nd May 1913 to the 24th July 1913. This loss does not exceed Rs. 120 in all.

The version of the defence, on the other hand, is that the loan was from the very beginning taken for the Hindustan Bank, that Daulat Rai executed the *hundis* in his personal capacity because the Amritsar Bank did not consider the Hindustan Bank a safe concern and was not, therefore, prepared to accept its pro-notes, that the money borrowed was used for the purposes of the latter Bank, and that the entries were made on the 2nd of May 1913 not with the intention of carrying out any dishonest scheme on the part of Daulat Rai, but to give effect in the books of the Bank to the real nature of the transaction.

We have considered these rival theories and are of opinion that the prosecution have failed to substantiate their version and that there is a good deal to be said in favour of the defence theory. To start with, we observe that the sole reason, which the prosecution could assign for the alleged dishonest act on the part of Daulat Rai, was the gain of Rs. 227-5-0, or to be more correct, of nearly Rs. 120. Now we regard this as a very improbable explanation and we are not at all convinced that a man of Daulat Rai's position and resourcefulness would resort to the commission of an offence of this nature simply with the object of obtaining the paltry sum specified above. The motive for the crime is, in our judgment, wholly inadequate.

The evidence on record conclusively establishes that out of the money which was borrowed from the Amritsar Bank, Rs. 1,716-11-0 were used by the Lahore Branch of the Hindustan Bank and that the balance was remitted to Multan. Though the entire sum was credited to Daulat Rai, an examination of his floating account with the Hindustan Bank shows that on the 31st of January 1913, before the receipt of any money from the Amritsar Bank, there was a balance of Rs. 225-5-9 to his credit and that on the 2nd of May 1913, after cancelling the debt and credit entries for Rs. 4,772-11-0, Daulat Rai was a debtor to the extent of Rs. 455-1-4. It is, therefore, clear that out of the money advanced by the Amritsar Bank he utilised only Rs. 455-1-4 to his private purposes and that the rest of the money remained all the time with the Hindustan Bank and after the 2nd of May 1913 was at its complete disposal. In fact, as observed already, part of it, *viz.*, Rs. 1,716-11-0 was actually used by the Lahore Branch of the Bank.

From the above, an inference may be drawn that the loan was contracted *ab initio* for the Hindustan Bank, and this receives further support from the evidence of Notan Das, P. W. No. 2, a clerk of the Amritsar Bank, who deposes to the fact that his Bank did not want to advance money to the Hindustan Bank and that Hari Chand told him that money was urgently required for the latter Bank. So much for the defence theory.

The prosecution assert that in January 1913, Daulat Rai needed money for some private purpose of his own and accordingly took the loan from the Amritsar Bank, and

In re MIR HYDER SAHEB.

that when later on he found that he did not require the money, he caused the entries to be made on the 2nd of May 1913 to get rid of his liability. It is to be observed that the alleged necessity, which compelled Daulat Rai to negotiate this loan, has not been disclosed, and even if we assume the existence of some pressing need which the complainant has been unable to discover, we fail to understand why Daulat Rai should cash the *hundis* by paying the discount before he actually required the money and should thereby suffer a loss of interest. One could expect that he would keep the *hundis* in his possession and present them for payment to the Bank just when he wanted the cash. Instead of adopting this reasonable procedure he, it is to be noted, received the entire consideration *minus* the discount and placed the money so received to his credit in his floating account with the Hindustan Bank. This does not strike us as a businesslike method and the reasonable explanation appears to be that the money was borrowed for meeting immediate or prospective demands on the Bank.

Our attention has also been drawn by the prosecution to the fact that at the end of the half year Daulat Rai got credit in his floating account for Rs. 16-8 on account of interest on the three items aggregating Rs. 4 772-11 and it is urged that this could not have been the case if the money had really belonged to the Bank from the very beginning. The point is not of much importance and the answer may be easily given. It is probable that, in accordance with the usual practice, the clerk of the Bank at the end of the half year took the account as it stood, calculated the interest on the different items, and made a credit entry accordingly. It is not shown that Daulat Rai was cognisant of the fact or that he ever authorized the clerk to do so.

These are the salient points of the case and after considering the *pros et cons* we are unable to sustain the charge on the slender material placed on the record by the prosecution. No doubt, the straightforward course for Daulat Rai to adopt was to credit the Amritsar Bank with the money as soon as it was received, but it may be that he honestly believed that as in the books of the Amritsar Bank he was himself shown as a debtor, the money should, to make the entries consistent, be credited to *him* in the books of the Hindustan Bank. Be that as it may, the evidence on the record is insufficient to justify a conviction under section 409, Indian Penal Code. We accordingly accept the appeal, set aside the conviction and sentence and acquit the appellant.

Appeal accepted.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 848 OF 1914.
CRIMINAL REVISION PETITION No. 701 OF 1914.

March 12, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re MIR HYDER SAHEB—ACCUSED No. 2—PETITIONER.

Penal Code (Act XLV of 1860), *ss.* 109, 352—*Inducing others to beat without taking part—Abetment.*

A person who merely says "beat" but does not take any part himself, can only be convicted of abetment of an offence under section 352 of the Penal Code.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Joint First Class Magistrate of Madanapalli, in Criminal Application No. 56 of 1914, preferred against that of the Second Class Magistrate of Madanapalli, in Calendar Case No. 367 of 1914.

Mr. *E. R. Osborne*, for the Petitioner.

The *Public Prosecutor*, for the Government.

ORDER.—All that appears from the evidence is that 2nd accused, who was sitting on the *pial*, said "beat." I am of opinion that the 2nd accused on the evidence can only be convicted of abetment of an offence under section 352 of the Indian Penal Code. The particular intention required to be proved before a conviction under section 353 or 355 can be sustained has not been made out. I convict the accused of abetment of an offence under section 352 and alter the sentence into one of imprisonment for the period he has already undergone and a fine of Rs. 100. As the fine has been paid, it is not decessary to fix any imprisonment in default.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 117 OF 1915.

March 13, 1915.

Present:—Mr. Justice Chamier.

BHAJAN TEWARI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 70—Local Government Rules under section 70, rr. 30, 31, 32—Execution—Power of Assistant Collector to order prosecution—Jurisdiction—Penal Code (Act XLV of 1860), s. 182.*

An Assistant Collector has no powers of either Civil, Revenue or Criminal Court while receiving an application under rule 30 of the rules framed by the Local Government under sections 68 and 70 of the Code of Civil Procedure, 1908. Hence if an offence as defined in section 182 of the Penal Code is committed in the course of making the application under the above rule, the Assistant Collector has no jurisdiction to order prosecution. [p. 90, cols. 1 & 2].

Criminal revision against an order of the Assistant Collector of Basti.

Mr. *R.K. Sorabji*, for the Petitioner.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—This is an application for revision of an order passed by an Assistant Collector of the first Class in the Basti District directing the prosecution of the applicant for an offence under section 182, Indian Penal Code. A question might arise as to whether this application should not have been presented under section 115 of the Code of Civil Procedure and not under Chapter XXXII of the Code of Criminal Procedure. But in the view I take of the case, it is unnecessary to discuss the question.

It appears that one Bindhachal Tewari obtained a decree for money against Bhajan Tewari and others in the Court of the Munsif of Basti. In execution of that decree immoveable property was ordered to be sold and the execution of decree was transferred under section 68 of the Code of Civil Procedure to the Collector of Basti. On October 23rd, 1914 a sale took place and the property was knocked down to one Ramphal Misra. On November 3rd 1914 the judgment-debtor presented a petition under rule 30* of the rules made by the Local Government under sections 68 and 70 of the Code of Civil Procedure praying for permission to pay the sum decreed and five per cent. of the purchase money. Next day he presented a petition in which he said he had paid in the sum required by rule 30, and he prayed that the sale might be set aside. On November 5th he put in a petition, saying that some unauthorized person had paid the money into the treasury and he charged Bansi and others with having compelled him to put his thumb impression on a blank paper which was subsequently used for the petition under rule 30. It is quite clear that the Assistant Collector to whom these applications were presented was a public servant, and I will

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*Rule 30. (1) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing with the Collector:—

(*a*) for payment to the purchaser, a sum equal to 5 per cent. of the purchase-money; and

(*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) where a person applies under Rule 31 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Rule 31. Where any immoveable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Collector to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Collector is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Rule 32. (1) Where no application is made under rule 30 or rule 31 or where such application is made and disallowed, the Collector shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under Rule 30 the deposit required by that rule is made within 30 days from the date of sale, the Collector shall make an order setting aside the sale:

Provided that no order shall be made unless notice of this application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

assume that a charge might properly be brought against Bhajan Tewari under section 182, Indian Penal Code, in respect of the statements made by him in his third petition. On behalf of Bhajan it is, however, contended that the Assistant Collector who ordered his prosecution had no power to do so not being a Civil, Criminal or Revenue Court. The Assistant Collector has the powers of a Magistrate of the first Class; but the application was not made to him as a Magistrate; it is clear that it was not made to him as a Revenue Court, and it is beyond question that even if the officer in question could be regarded as a Criminal or Revenue Court, the alleged offence was not committed before him or brought under his notice in the course of any judicial proceeding of a Criminal or Revenue Court. The question is whether the Assistant Collector was, or had the powers of, a Civil Court in respect of the application made by Bhajan Tewari. The rules made by the local Government above referred to contain provisions authorizing a Collector to make over to any Assistant Collector of the first Class any of the powers and duties conferred by the rules upon the Collector with certain exceptions. It seems that in respect of powers and duties delegated by the Collector to an Assistant Collector of the first class the latter may be a Civil Court, for section 7[9] of the Code of Civil Procedure authorizes the Local Government to make rules conferring upon a Collector or any gazetted subordinate of the Collector all or any of the powers which the Court, that is, the Civil Court, might have exercised in the execution of the decree, if the execution had not been transferred to the Collector. Among the powers of a Collector which may not be delegated to an Assistant Collector under the rules are the power to order a sale under paragraph (1) (*c*) and certain other paragraphs of the third Schedule to the Code of Civil Procedure and the power to confirm a sale or set aside a sale under rule 32 of the rules made by the Local Government. It thus appears that the Assistant Collector who has ordered the prosecution of the applicant had not power either to sell the property as a Court or to confirm the sale or to set it aside. The application in respect of which the prosecution has been ordered was presented to the Assistant Collector. Possibly no objection could be taken to this; but the Assistant Collector could not deal with the application. He could only pass it on to the Collector who would then dispose of it with the powers of a Civil Court. It appears to me that so far as the application in question was concerned, the Assistant Collector had no powers of a Civil Court and the application was not presented to him in the course of a judicial proceeding. That being so, I must hold that the Assistant Collector had no power to order the prosecution of the applicant. I, therefore, set aside his order.

Order set aside.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 613 OF 1914.
CRIMINAL REVISION PETITION No. 519 OF 1914.

March 11, 1915.

Present:—Mr. Justice Seshagiri Aiyar.

In re VAYALAPPRA KELAPPAN NAIR AND OTHERS—ACCUSED—PETITIONERS.

Irregularity—Admission of evidence, when writing judgment—Charge of theft, assertion of right in answer to—Bona fides, *how negatived.*

A Magistrate cannot, after a trial is closed and while he is writing his judgment, admit in evidence a document without giving the accused an opportunity of raising objections to its relevancy or admissibility. [p. 91, col. 1.]

There cannot be a *bona fide* assertion of right in answer to a charge of theft when the accused knew that he had no possession of the property and gathered a produce grown by the complainant thereon. [p. 91, col. 1.]

Pandita v. *Rahimulla Akundo*, 27 C. 501; 4 C. W. N. 480, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tellicherry, in Criminal Application No. 47 of 1914, preferred against that of the Court of the second Class Magistrate of Payyanur, in Calendar Case No. 23 of 1914.

Dr. *S. Swaminadhan*, for the Petitioner.

The Acting Public Prosecutor, for the Government.

Mr. *C. Madhavan Nair*, for the Complainant.

RASUL KHAN *v.* EMPEROR.

ORDER.—Counsel for petitioners and the counter-petitioner have argued this case with some warmth before me. I have come to the conclusion that no case has been made out against the 2nd and 3rd accused. They assisted the first accused in gathering the pepper and there is nothing to suggest that they did not believe that the first accused had a right to the pepper. The conviction and sentence as regards these two accused must be set aside and the fine must be refunded to them.

The case of the first accused stands on a different footing. A good portion of the judgment of the second Class Magistrate is taken up with the discussion of the title relating to the 70 cents in dispute. The Appellate Magistrate fortunately has not followed this procedure. A Magistrate will not find it easy to decide the title of the contending claimants when the question is incidentally raised in a theft case . Moreover the documents produced in this case are not easily reconcilable. The second Class Magistrate has also admitted a new document in evidence when he was about to write a judgment without giving the accused an opportunity of raising objections to its relevancy or admissibility.

Notwithstanding these irregularities, he has given his finding on the evidence regarding possession. The Appellate Court has confirmed that finding, although the Appellate Magistrate has committed a few errors in the statement of the case. That finding, it is clear to my mind, negatives *bona fides* on the part of the 1st accused in gathering the pepper. It has to be remembered that the 1st accused denied that he went upon the premises. This again shows that his claim to the pepper is not a *bona fide* one : The decision in *Pandita* v. *Rahimulla Akundo* (1) shows that Courts will not conclude in favour of the *bona fide* assertion of a right when the accused knew that he had no possession of the property and gathered a produce grown by the complainant. I confirm the conviction of the 1st accused. Dr. Swaminadhan's argument that the assault was justifiable cannot be accepted, as the 1st accused had no right to be upon the *paramba*.

(1) 27 C. 501; 4 C. W. N. 480.

I think a fine of Rs. 100 will meet the ends of justice. I reduce the fine accordingly. The other Rs. 100 will be refunded to the 1st accused.

Revision allowed; *Sentence reduced.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 60 OF 1915.

March 26, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

RASUL KHAN AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 302—Assault—Death caused by assault—Common object—Offence.

In an attempt to rescue certain cattle from being driven to the pound one of the persons of the accused party ordered the others to use their *lathis* and beat the other party. The *lathis* were at once used with the result that one of the opponents died:

Held, that the offence was committed in furtherance of the common object of the party and each one of the accused was guilty of an offence under section 302 of the Penal Code. [p. 92, col. 1.]

Criminal appeal from an order of the Sessions Judge of Aligarh.

Mr. *C. Dillon* (with him Mr. *Muhammad Hameed Ullah*), for the Appellants.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an appeal by nine persons against convictions under section 302 read with section 149 of the Indian Penal Code and sentences of transportation for life. The main facts of the case are proved beyond all possible doubt. The cattle of the accused's party were trespassing and apparently doing considerable damage to the crop growing in a field belonging to the complainants. The complainants' party drove off the cattle and were bringing them to the pound. Some twelve or thirteen persons rushed down armed with *lathis* to rescue the cattle. Ranne Khan, appellant, at once gave the command to rescue the cattle and to use their *lathis*. The appellants' party at once proceeded to carry out the order. One of the complainants' party, a man named Lekha, ran away for

about ten paces pursued by three men, all of whom are amongst the appellants, namely, Rasul Khan, Hakim Ali and Ashraf. They surrounded him, cutting off his retreat. All the witnesses agree that Rasul struck him with a *lathi* on the top of the head. The witnesses also agree that he was struck by Ashraf and Hakim Ali. There is some discrepancy as to which of these two last-mentioned persons actually struck him on the head, but he was struck again on the head with a *lathi*. He was struck with *lathis* even after he fell to the ground. The attack was unprovoked, save about the cattle, and the complainants' party were unarmed. The medical evidence shows that Lekha received two fractures of the skull,—on the right and left temple. He also had a contusion over the left side of the chest and over the left eye. Death resulted almost immediately. Another of the complainants' party, named Chuta, received injuries, which caused compound fractures of both bones of the right arm and a simple fracture of the left arm. Another man, Puran, suffered compound fracture of the right ulna.

We have first to consider what was the offence which caused the death of Lekha. These blows on the head with *lathis* were undoubtedly sufficient in the ordinary course of nature to cause death. They were intentionally struck and death resulted. The appellants' party seem to have acted with considerable ferocity and cruelty. In our opinion the evidence amply justifies the finding that an offence under section 302 was committed.

We have next to consider whether or not this offence was committed in "pursuance" of the common object of the appellants' party. All the members of this party came down armed with *lathis*, and the man who seems to have been the most influential amongst them, namely, Ranne, ordered them to use their *lathis*, and the *lathis* were at once used with the result which we have stated before. Taking the evidence as a whole, we think that it is impossible to say that the offence, which was in fact committed, was not committed in "prosecution of the common object." Section 149 provides "that where an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person, who at the time of the committing of that offence is a member of the same assembly, is guilty of that offence." Some attempt was made to show that the killing of Lekha was a separate transaction. We think that this contention cannot be sustained on the evidence, and that all the appellants were members of an unlawful assembly at the time that Lekha met his death. On these findings the appeals must necessarily be dismissed. We have no power to award any less punishment than the punishment of transportation for life. We, however, think it right to say that in our opinion the most guilty of the appellants were Ranne Khan, Rasul Khan, Ashraf and Hakim Ali. There is no evidence to show that Ranne struck any blow himself, but he was undoubtedly more responsible than any one else. It is said that he is a very old man, perhaps this was the very reason why his advice was followed. It is difficult to draw any distinction between Rasul, Ashraf and Hakim Ali. They were all beating the unfortunate Lekha at the same time, Rasul beyond doubt struck him one of the blows on the head which caused the fracture to his skull. If it were within our power to do so, we would award substantially less punishment to the other appellants. We dismiss the appeals.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 1528 OF 1914.

November 9, 1914.

Present:—Mr. Justice Shadi Lal.

EMPEROR—PROSECUTOR

versus

BAIJ NATH—ACCUSED.

Penal Code (*Act XLV of* 1860), *ss.* 420, 467—*Current coin, title to—Proceeds of cheating paid in satisfaction of debt—Right of creditors to retain money—Criminal Procedure Code* (*Act V of* 1898), *s.* 517.

Title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt due to him. [p. 94, col. 1.]

In re Collector of Salem, 7 M. H. C. R. 233; 2 Weir 664, *Empress* v. *Joggessur Mochi*, 3 C. 379; 2 Ind. Jur. 7?6. *Kanshi Ram* v. *Secretary of State*, 83 P. R. 1890, referred to.

EMPEROR v. BAIJ NATH.

Where, therefore, during the Police investigation of a case under sections 420 and 467 of the Penal Code, it appeared that the accused had delivered over a sum of Rs. 1,168 to his creditors, this money being part of the proceeds of cheating, and the Police recovered it from the creditors:

Held, that the creditors were entitled to the money and that it must be returned to them. [p. 94, col. 1.]

Case reported by the District Magistrate, Hissar, with his No. 1949-G. of the 4th of August 1914.

FACTS.—In 1912 Duni, Jiwan, Bankia and others were *challaned* under sections 420/467, Indian Penal Code, for cheating in connection with some *hundis*. The case first was tried by the District Magistrate, but on one of the accused accepting a pardon, the case was transferred to the District Judge. All were found guilty and sentenced to various terms of imprisonment by Sultan Asad Jan, District Judge and Magistrate, 1st Class, with section 30 powers, on 31st of July 19 2. During the Police investigation the Police found that the accused had delivered over some Rs. 1,168 to his creditors, this money being part of the proceeds of his cheating. The Police recovered it from the creditors and by the order of District Magistrate, dated the 24th April 1912, it was handed over to the complainant. The appeal of Jiwan and Duni was rejected by the Chief Court on the 22nd of May 1913. On the 14th of February 1914 the creditors applied to Mr. Anderson, Magistrate, first Class, with section 30 powers to have the money recovered from the complainant and given over to them. On 20th of March 1914 (by an error it is entered as 20th of April 1914) that Magistrate held that this could not be done and referred the applicants to a Civil Court. On 23rd of March 1914 Counsel urged the point again and the Magistrate gave notice to the opposing parties and on the 15th of April 1914 the Magistrate ordered (thereby cancelling his order of 20th March 1914) that the money "must be returned to the persons from whom it was taken," *i.e.*, to the creditors of the accused.

The petitioner was, by District Judge, Hissar, exercising the powers of a Magistrate of the first Class in the Hissar District, sentenced, by order dated the 15th of April 1914, under sections 420/467 of the Indian Penal Code, to return and refund Rs. 1,168-2-6 to the persons from whom they were taken.

The proceedings are forwarded for revision on the following

GROUNDS. *Firstly*, that when once a Court has passed an order it cannot *suo motu* review and cancel that order. *Secondly*, that the present Magistrate has no jurisdiction to hear the application, as the present Magistrate is not a successor of the Court which decided the section 420 case.

The first ground is certainly valid and no rulings need be quoted. As regards the 2nd ground *Phina Singh* v. *Empress* (1), *Muhammad Ishaq* v. *Muqim-ud-din* (2) apply, and they hold that a first class Magistrate's Court with section 30 powers is not a permanent Court which could pass an order under section 517 in a case decided by its predecessor. As the order of 15th of April 1914 is not a legal one, I recommend that it be set aside by the Chief Court. I have no doubt that in the Chief Court the parties will come forward with some suggestion as to what machinery should be used for the disposal of the money.

Lala *Sham Lal*, for the Creditors.

Lala *Bulwant Rai*, for the Accused.

ORDER.—The facts of this case are stated in the report submitted by the District Magistrate under section 438, Criminal Procedure Code, and need not be repeated here. It seems to me that it is unnecessary to determine the question whether Mr. Anderson could *suo motu* review his previous order, dated the 20th March 1914, and whether he was debarred from passing an order under section 517, Criminal Procedure Code, by the fact that another Magistrate exercising jurisdiction under section 30, Criminal Procedure Code, had decided the criminal case in which the three accused had been convicted. The case ultimately came up in revision before the Chief Court, and this Court was fully competent to pass such orders as to the disposal of the property as it thought fit.

In any case the record of the proceedings is now before me and I can correct

(1) 25 P. R. 1889 Cr.
(2) 9 Ind. Cas. 178; 7 P. R. 1913 Cr.; 207 P. L. R. 1913; 14 Cr. L. 178 Cr.

the mistakes of the subordinate Courts and make under section 439, Criminal Procedure Code, such orders as may be just and proper.

It appears that during the Police investigation, a sum of Rs. 1,168 was recovered from certain creditors of the accused to whom the money had been paid by them (the accused) after the commission of the offence of cheating. This money was, according to the prosecution, part of the proceeds of cheating, and the question arises whether it should be returned to the creditors or not.

Now it is a settled rule of law that title to money which is current coin of the realm passes by mere delivery to a person who receives it in satisfaction of a lawful debt due to him, *vide In re Collector of Salem* (3) and *Empress* v. *Joggessur Mochi*(4). The same view is taken by this Court in *Kanshi Ram* v. *Secretary of State* (5). As observed by Cave, J., in *Ex parte Wolverhampton and Staffordshire Banking Company; In re Campbell* (6): "There are no doubt cases in which money cannot be recovered by the rightful owner from the person who has obtained possession of it. This is one of the incidents attaching to a payment of current coin." The principle of these judgments applies to the present case and I fail to see how it can be seriously urged that the creditors are bound to return the money to the persons from whom their debtor acquired it by committing the offence of cheating. Money is not ear-marked and it cannot be said that the identical coins received from the complainant were paid to the creditors.

For these reasons, I have no hesitation in holding that the creditors are entitled to the money which was recovered from them by the Police. I accordingly direct that Rs. 1,168 be returned to them.

Revision accepted.

(3) 7 M. H. C. R. 233; 2 Weir 664.
(4) 3 C. 379; 2 Ind. Jur. 786.
(5) 83 P. R. 1890.
(6) (1884) 14 Q. B. D. 32 at p. 36; 33 W. R. 642; 1 Morrell 261.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 824 OF 1913.

November 30, 1913.

Present:—Mr. Justice Chevis and Mr. Justice Rossignol.

GAYAN SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 307—*Infliction of many incised wounds on head—Inference—Murderous intent—Benefit of doubt.*

A culprit who inflicts 10 incised wounds on the body of a person, most of which are aimed at his head, must be credited with murderous intent. [p. 96, col. 1.]

Where several persons profess to be eye-witnesses standing at a short distance from the scene of the crime but fail to explain satisfactorily why none of them did not come to the rescue of the injured man, the probability is that they did not see the assault. In such a case the evidence of the complainant should be accepted with reservations and the benefit of the doubt should be given to those against whom it is not sufficiently corroborated. [p. 96, col. 1.]

Appeal from an order of the Sessions Judge, Ferozepore, dated the 2nd September 1913, convicting the appellants.

Messrs. *Nand Lal* and *Meakins*, for the Appellants.

Kanwar *Dalip Singh* (for the Government Advocate), for the Respondent.

JUDGMENT.—The appellants, who are brothers, have been convicted of an attempt to murder Tek Singh, their collateral, and have been sentenced, Gayana to transportation for life, Jawala to tranportation for 10 years and Shama to five years' rigorous imprisonment, sentence of imprisonment to include three months' solitary confinement.

The alleged motive for the assault was that the complainant had sown a crop, and the two former appellants had reaped a portion of it. They were prosecuted by the complainant on a charge of theft and on the 9th May the Magistrate investigating the charge visited the disputed field and ordered the parties to appear before him on 10th May. He is said to have expressed an opinion that the complainant's charge was justified.

To turn now to the prosecution account of the events on which this case is based, complainant states that he slept on the night of the 9th May on his threshing floor, that at dawn all three appellants came to him

and begged him to compromise and not attend the Court that day. When complainant remained obdurate to their prayer, they attacked him. Gyana struck the first blow. He was armed with a *gandasi*, Jawala with an axe, and Shama with a *gandhala*.

There is direct corroborative evidence by Kharak Singh and Amar Singh, who were sleeping within a few paces of complainant and by Dyal Singh, who was only 30 *karms*= 50 yards away.

The questions for decision are, whether this evidence is trustworthy, what offence was committed and which, if any, of the three appellants took part in this offence.

The learned Sessions Judge has expressed surprise that the injuries inflicted, though numerous, were so slight, but finds that as most were probably aimed at the head, death was intended by the assailants; we share his surprise, but we cannot avoid the conclusion that the reason must be sought for in some false presentation of the events.

If the story given by the prosecution is true, then the appellants had complainant at their mercy, could have inflicted death with one good blow on the head, and to judge by the slight nature of the wounds inflicted, must have gone out of their way to inflict only superficial cuts.

It is true that the Sub-Assistant Surgeon found 20 injuries on the person of the complainant, but they had been stitched before he saw them, so that we are at a loss to understand how he was in a position to say that some of the wounds were more cleanly cut than others, and were, therefore, caused probably by different weapons.

The individual who first saw the wounds and stitched them was not called upon to depose as a witness.

On the forehead were two small bruises which were only skin deep. The Sub-Assistant Surgeon stated that most of the wounds could be caused with the edge of an ordinary *gandhala*.

Now a *gandhala* is an implement used for making holes for planting bushes, etc., its edge is not at all sharp and is generally 1 inch to $1\frac{1}{2}$ inches in length. It is not a cutting instrument, would not cause a clean wound, and would undoubtedly break the underlying bone, if used with such force as to penetrate the flesh.

We are convinced that none of the injuries found on complainant were produced with a *gandhala* blade.

As to the weapons used, there is a discrepancy between the evidence and the first report; the first report mentions a *takaya* (small hatchet) *gandhala* and *lathi*. The evidence is that Gayana used a *gandasi*, Jawala a hatchet, and Shama a *gandhala*.

The main witnesses in the case are Kharak Singh, Amar Singh and Dyal Singh. The first two were within a few paces, 10 to 12 yards, of Tek Singh, yet they say they made no attempt to defend Tek Singh nor to pursue and secure the appellants. It appears from the Police papers that several other men were in the neighbourhood, yet no attempt was made to rescue Tek Singh.

The learned Government Advocate admits the difficulty of the slight nature of the injuries inflicted and suggests that the appellants wished merely to torture the complainant and extort a compromise from him and consequently they inflicted cut after cut in order to induce him to a conclusion favourable to themselves, but Counsel admits that if we accept his suggestion, we must reject the prosecution evidence except in its bare outline.

The two junior brothers deny the charge entirely, whilst Gayana, the senior, admits striking complainant with a stick at his (Gayana's) *pir* during the night, he imagined complainants had come there to thieve. He also admitted that a shirt was taken from him and on it the Chemical Examiner found blood stains.

The complainant states that Gayana struck him with the *gandasi* on the forehead and the others only aimed blows at him before he fainted.

After careful consideration of the evidence and a perusal of the Police diaries, we see no reason to doubt that the appellant Gayana or Gayan Singh did commit this offence, but we have no confidence that either Jawala or Shama were participators in it. No doubt Jawala at any rate was equally interested with Gayana in the theft case, but he seems to be much younger than Gayana, and Shama was not a party to that case.

In view of their admitted failure to come to the rescue of complainant, we think it highly probable that Amar Singh, Kharak Singh and Dyal Singh did not see the assault,

and on the whole we find the only safe conclusion is that Gayan Singh alone took a part in this affair. The injuries borne by complainant entirely fail to suggest the employment of a heavy bruising weapon such as a *gandhala* or even a *lathi*. The slight nature of the incised wounds is probably due to the fact that the complainant was able to dodge them and his assertion that he received them as he lay unconscious on his bed is in all probability false. We accept his evidence, with certain reservations, against Gayana only. In these circumstances, in view of the fact that the blows were aimed at the head, Gayan Singh must be credited with murderous intent and we refuse to alter either the conviction or the sentence in his case. To the other two appellants we give the benefit of a very substantial doubt and they are accordingly acquitted.

Appeal partly accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 320 OF 1914.

January 26, 1915.

Present: Mr. Justice Ayling and
Mr. Justice Tyabji.

In re ADAPALA VENKATA NARASA REDDY AND ANOTHER—APPELLANTS.

Letters Patent (Madras), cl. 15—Criminal trial—Revision—Appeal, if competent.

An order passed by a single Judge of the High Court in the exercise of its criminal revisional jurisdiction is one passed in a criminal trial if the proceedings which gave rise to the revision were a criminal trial, and no appeal lies under clause 15 of the Letters Patent against such an order.

In the matter of Ramasamy Chetty, 27 M. 510; 1 Weir 787; 1 Cr. L. J. 1087, followed.

Appeal against the judgment of his Lordship the Hon'ble Mr. Justice Spencer, dated the 28th of August 1914, in Criminal Revision Case No. 120 of 1914, preferred against that of the Court of the first Class Deputy Magistrate of Kavali, in Calendar Case No. 53 of 1913.

FACTS.—The appellants were charged with the offence of robbery in forcibly taking away a buffalo belonging to the complainant from the grazing ground, where it was in charge of her servant, and in assaulting the complainant and using abusive language towards her. The first Class Deputy Magistrate of Kavali, who tried the case, holding that the matter was grossly exaggerated, convicted the accused, the 1st under section 352, Indian Penal Code, and the second under section 504, Indian Penal Code, and sentenced them to a fine of Rs. 50 each. Against this conviction and sentence a revision petition was filed in the High Court. Spencer, J., who heard the revision petition, held that the convictions were correct, but reduced the fine to Rs. 20 each. The accused then preferred this appeal under the Letters Patent.

Mr *Sidney Smith* for the Public Prosecutor, for the Crown, raised a preliminary objection that no appeal lay and relied upon *In the matter of Ramasamy Chetty* (1).

Mr. *V. C. Seshachariar*, for the Appellants:—An appeal lies under the Letters Patent—Vide *In the matter of Horace Lyall* (2). The decision in *In the matter of Ramasamy Chetty* (1) does not apply to the facts of the case. Proceedings in revision are not criminal trials, but are in the nature of appeals—Vide *Shew Prosad* v. *Ram Chunder* (3). The law certainly makes a distinction between original trials and proceedings by way of appeal and revision. Even under the English Law, Courts of error are different from trial Courts. Further the opinion that the order in revision is in a criminal trial is that of a single Judge. The other learned Judge bases his decision upon a different point altogether. And the weight of the decision is considerably shaken by the ruling in *Puthukudi Abdu* v. *Puvakka Kunhikutti* (4), on which it is based, being in effect overruled by the decision of the Full Bench in *T. V. Tuljaram Row* v. *Alagappa Chettiar* (5).

ORDER.—The proceedings before the Deputy Magistrate were indisputably a criminal trial and there is clear authority in *In the matter of Ramasamy Chetty* (1) for holding that the order of Spencer, J., declining to interfere with the conviction was also an order in a criminal trial. It follows that no Letters Patent appeal lies.

The Letters Patent appeal is dismissed.

Appeal dismissed.

(1) 27 M. 510; 1 Weir 787; 1 Cr. L. J. 1087.
(2) 29 C. 286; 6 C. W. N. 54.
(3) 23 Ind. Cas. 977; 41 C. 323.
(4) 27 M. 340.
(5) 8 Ind. Cas. 340 35 M. 1; (1910) M. W. N. 696; 8 M. L. T. 453; 21 M. L. J. 1.

ALLAHABAD HIGH COURT.
CRIMINAL REVISION PETITION No. 175 OF 1914.
March 22, 1915.
Present:—Mr. Justice Chamier and
Mr. Justice Piggott.
TILAK PANDEY AND OTHERS—APPLICANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—Time within which proceeding should be taken—Limitation.

There is nothing in section 476 of the Criminal Procedure Code which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. [p. 98, col. 2.]

Nawal Singh v. *Emperor*, 14 Ind. Cas. 766; 13 Cr. L. J. 302; 34 A. 393; 9 A. L. J. 481; *Girwar Prashad* v. *Emperor*, 1 Ind. Cas. 306; 6 A. L. J. 392; 9 Cr. L. J. 219, followed

Emperor v. *Rustomji Hormusji Tarwalla*, 4 Bom. L.R. 778, *Lakshmidas Lalji, In re*, 32 B. 184: 3 M. L. T. 116; 10 Bom. L. R. 28; 7 Cr. L. J. 35; *Aiyakannu Pillai* v. *Emperor*, 1 Ind. Cas. 597; 4 M. L. T. 404; 9 Cr. L. J. 41; 32 M. 49; 19 M. L. J. 42 (F. B.), *Rahimadulla Sahib* v. *Emperor*, 31 M. 140; 3 M. L. T. 79; 17 M. L. J. 584; 7 Cr. L. J. 54, referred to.

Revision against the order of the Subordinate Judge of Basti, dated the 1st September 1914.

FACTS.—One Shiv Narain died leaving *Musammat* Mohra, a daughter, *Musammat* Abbraji, a widowed daughter-in-law, and *Musammat* Daulata, the widowed daughter-in-law of one of Shiv Narain's brothers. Every one of the three applied to the Revenue Court for mutation in her name. *Musammat* Daulata retired, but *Musammat* Mohra and *Musammat* Abbraji compromised and agreed that Abbraji's name should continue for her life and after that Mohra's name should be recorded, Later on Triloke Pande and others, collaterals of Shiv Narain, applied to the Revenue Court objecting to the compromise and the order of the Revenue Court thereon. Abbraji supported the collaterals. The Revenue Court referred them to the Civil Court. Two suits one by Mohra for possession and the other by Triloke for possession were brought before the Sub-Judge, Triloke's case being that Mohra was not Shiv Narain's daughter. The Sub-Judge held that Mohra was Shiv Narain's daughter and took action under section 476, Criminal Procedure Code, against the applicants for false verifications of pleadings and giving false evidence.

The applicants applied in revision to the High Court.

Mr. *Harnandan Lal* (with him Mr. *Lakshmi Narayan*), for the Applicants:—The Subordinate Judge had no jurisdiction to take action long after the case was decided. He gave his decision in the case on the 18th February 1914. He issued notice on the 21st March 1914, more than a month after the judgment, and he passed orders under section 476, Criminal Procedure Code, on 11th May 1914, three months afterwards. I submit his order was clearly without jurisdiction. He ought to have taken action either immediately at the close of the proceeding or so soon afterwards as to make it reasonably appear to be a part of that proceeding. It was so held in *Rahimadulla Sahib* v. *Emperor* (1), *Aiyakannu Pillai* v. *Emperor* (2). Moreover the Judge's order shows that there was no definite evidence of the offences charged before him. He seems to have acted more on suspicion than anything else. He ought to have been statisfied by *prima facie* evidence that the offence had been committed. His judgment shows that he decided on probabilities. I rely on *Mahomed Bhakku* v. *Queen-Empress* (3).

Mr. *A. E. Ryves*, for the Respondent, referred to *Girwar Prashad* v. *Emperor* (4), *Nawal Singh* v. *Emperor* (5) and was not called upon to reply.

JUDGMENT.—This is an application for revision of an order of the Subordinate Judge of Gorakhpur, under section 476 of the Code of Criminal Procedure, directing the procecution of the applicants on various charges in connection with pleadings verified, and evidence given by them, in two cases tried by the Subordinate Judge. It appears that one *Musammat* Mohra brought a suit to establish her right to certain property as the daughter of Shiv Narain. The applicants and others brought another suit against *Musammat* Mohra for possession of property, on the ground th t she was not the daughter of Sheo Narain. The two

(1) 31 M. 140; 3 M. L. T. 79; 17 M. L. J. 584; 7 Cr. L. J. 54
(2) 1 Ind. Cas. 597; 32 M. 49; 19 M. L. J. 42 (F. B.); 4 M. L. T. 404; 9 Cr. L. J. 41.
(3) 23 C 532.
(4) 1 Ind. Cas. 306; 6 A. L J. 392; 9 Cr. L. J. 219.
(5) 14 Ind. Cas. 766; 9 A. L. J. 481; 13 Cr. L. J. 302; 34 A. 393.

In re RUKMANI AMMAL.

cases were tried together, and the Subordinate Judge found that *Musammat* Mohra was the daughter of Sheo Narain. He waited for a month probably to see whether appeals would be filed against his decision, and as soon as the month had expired he took proceedings against the applicants under section 476 of the Code of Criminal Procedure. On the part of the applicants it is contended that the Subordinate Judge had no jurisdiction to take action against them a month or more after he had disposed of the cases in which the offences are alleged to have been committed. We have been referred to several decisions on the subject. A Full Bench of the Madras High Court (Miller, J, dissenting) has held that the power conferred by section 476, Criminal Procedure Code, can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the proceedings in the course of which the offence was committed or brought to notice. See *Aiyakannu Pillai* v. *Emperor* (2), which followed a previous decision of the same Court in *Rahimadulla Sahib* v. *Emperor* (1). The Madras High Court declined to follow the decision of the Bombay High Court in *Lakshmidas Lalji, In re* (6), in which the learned Judges said that they were unable to find anything in the language of section 476 making it incumbent upon a Court acting under it to take action, if at all, within any particular period or at any particular time. There is also a reported decision to the effect that action should not be taken by a Court under section 476 before the close of the case in which the offence is brought to the notice of the Court. See *Emperor* v. *Rustomji Hormusji Tarwalla* (7). This Court in *Girwar Prasad* v. *Emperor* (4) declined to follow the decision of the Madras High Court referred to above, and held that a Munsif had jurisdiction to take action under section 476, 18 months or more after the conclusion of the case in which the offences were said to have been committed, and in *Nawal Singh* v. *Emperor* (5), Mr. Justice Banerji upheld the order of a Subordinate Judge passed under section 476 several years after the conclusion of the case in which the offences were said to have been committed. We agree with the view which has hitherto been taken by this Court that there is nothing in section 476 which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. Cases can easily be imagined where it would be impossible or inadvisable to take action immediately on the conclusion of the case. In the present case the Subordinate Judge appears to us to have exercised a wise discretion in abstaining from taking action against the applicants until he knew that no appeal had been filed against his decision. It would have been useless to prosecute the applicants for the offences which they are supposed to have committed, if there had been an appeal in the case and the District Judge had held that *Musammat* Mohra was not the daughter of Sheo Narain. We express no opinion on the merits of the case or on the advisability of the prosecution which has been ordered. In our opinion the Subordinate Judge had jurisdiction to direct the prosecution of the applicants and we have, therefore, no power to interfere with his order. The application is dismissed with costs, including fees in this Court on the higher scale.

Application dismissed.

S. N. DAR, B.A., LL.B.,
Vakil High Court,
SRINAGAR (Kashmir).

(6) 32 B. 184; 3 M. L. T. 116; 10 Bom. L. R. 28; 7 Cr. L. J. 35.

(7) 4 Bom. L. R. 778

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 710 OF 1914.
CRIMINAL REVISION PETITION NO. 597 OF 1914.

March 26, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re RUKMANI AMMAL AND ANOTHER—ACCUSED NOS. 1 AND 2—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 4 (h), 199—Complaint—Petition by husband simply for coercing wife, whether a complaint—Magistrate directing Police inquiry—Charge sheet preferred before another Magistrate—Jurisdiction.

Where the accused No. 1 leaving her husband's house went to the house of accused No. 2 with her jewels and some property, and the husband went to the house of

S. N. DAR, B. A., LL. B.
Vakil High Court,
SRINAGAR (Kashmir)

In re RUKMANI AMMAL.

the Deputy Magistrate at about 9 P. M., where was also the first accused, and presented a complaint not with the object of getting the Magistrate to take action but simply to coerce his wife to give back the jewels:

Held, that there was no complaint under section 199 of the Criminal Procedure Code such as could entitle the Magistrate to take cognizance of the case after the death of the husband. [p. 100, col. 2.]

Where a Magistrate having cognizance of a case refers it to the Police for inquiry and report, the Police have no power to prefer a charge sheet before nother Magistrate and such other Magistrate has no jurisdiction to take cognizance of the case. [p. 100, col. 2]

It is not open to persons after the husband's death to revive proceedings which were dropped during his life-time. [p. 100. col. 2.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Vellore in Calendar Case No. 35 of 1914.

Messrs. *J. L. Rosario* and *K. Narasimha Aiyar*, for the Petitioners.

The Acting *Public Prosecutor*, for the Government.

Mr. *N. S. Narasimhachariar*, for the Complainant.

ORDER.—This is an application to revise the order of the Sub-Divisional Magistrate of Vellore, on the grounds that he had no jurisdiction to try the charges against the accused and that his order dated 8th October 1914 is illegal.

On the 13th February 1914, the 1st accused, who is the wife of the deceased Seshachari, Inspector of Police, is alleged to have left her husband's house, gone to the house of the second accused with her jewels and some property. Seshachari went to the house of the Deputy Magistrate at about 9 P.M. and the 1st accused, his wife, was there. He presented a complaint (Exhibit E) describing himself as the complainant and the present 1st and 2nd accused as the accused. The complaint runs as follows :—"The 2nd accused enticed away the 1st accused, the wife of the complainant. The 2nd accused made away with the jewels valued at Rs. 2,050 and 3 silver vessels..... The 1st accused abetted this theft. So I charge the 1st accused under sections 498 and 379/109 and the 2nd under section 379, Indian Penal Code. Pray inquiry and justice." According to the evidence of the Deputy Magistrate, he received Exhibit E and explained the gist of it and the consequences to the 1st accused and told her that he would take the sworn statement of Seshachari and after going through that formality, he would take cognisance of the offence and issue a warrant for her arrest. This is what he says as to what subsequently happened: "The 1st accused then said she would deliver up the properties. There was, therefore, then no cause for further action in the matter. She went away with the late Mr. Seshachari. Seshachari did not afterwards come to me until the 20th idem. He mentioned to me that his wife had not delivered the jewels and that she was staying away from him in a separate house. He expressed that all endeavours at reconciliation had failed and he requested that I should take action on his complaint. I was going to take his sworn statement, when he happened to look at my watch on my table and said it was *Rahu Kalam* and that he would come again later on and make the sworn statement before me." In cross-examination he states: "I wrote on it (Exhibit E) 'sworn statement of T. M. Seshachari.' I wrote it with a view to examine him on oath. After writing this down, I explained the situation to accused, and as she agreed to surrender the properties, I did not record the sworn statement. After the woman agreed to surrender the properties, Seshachari did not press me to record a sworn statement. Seshachari did not tell me that he would recover the jewels from the woman and that no further action need be taken."

Seshachari committed suicide the next day and his son preferred a formal complaint to the 2nd Class Magistrate charging the two accused under the sections above mentioned. When he was examined by the Magistrate he stated as follows:—"My father presented only this statement (Exhibit E) to Mr. Saldanha on Friday. He did not present the complaint. Subsequently thinking that he may smoothly get back the properties he came away, saying that he would present a complaint. He was accordingly inquiring for the clue. He was saying that he would go and give the com-

plaint this morning, meanwhile he shot himself."

On receiving the complaint of the present complainant the second Class Magistrate took cognisance of the offence and issued a warrant for the 1st accused's arrest and apprehension. After issuing the warrant on the 22nd, he asked the Station House Officer to investigate the case. While matters were in this state, the Police laid a charge sheet before the Deputy Magistrate under sections 498 and 379 of the Indian Penal Code and he proceeded to inquire into the case. Objection was taken to the jurisdiction of the Deputy Magistrate on two grounds, namely, (1) that there was no complaint as required by section 199 of the Criminal Procedure Code so as to give the Court jurisdiction to take cognisance of the offence under section 498 and (2) that the second Class Magistrate having had cognisance of the case and having referred it to the Police for inquiry and report, the Police had no power to prefer a charge sheet before the Deputy Magistrate and that the Deputy Magistrate had no jurisdiction to take cognisance of the offence.

The first question is whether Exhibit E is a complaint satisfying the provisions of section 199 of the Criminal Procedure Code, which requires that a complaint should be made by the husband of the woman, or in his absence, by some person who had care of such woman on his behalf at the time when such offence was committed. "Complaint" is defined in section 4 of the Criminal Procedure Code as the allegation made orally or in writing to a Magistrate, with a view to his taking action under the Code, that some person, whether known or unknown, has committed an offence and the short point is whether when Seshachari went to the Magistrate's house at night and presented Exhibit E, he did so with a view to the Magistrate taking action under the Criminal Procedure Code or whether his object was simply to intimidate his wife and get the return of the jewels without having recourse to criminal proceedings. On a careful consideration of the evidence of the Deputy Magistrate, I am of opinion that the object of Seshachari was not to get the Magistrate to take action, but simply to have recourse to him for coercing his wife to give back the jewels which she had taken. He and his wife were in the house of the Deputy Magistrate at about 9 P M. and when the Deputy Magistrate wanted to take the sworn statement of Seshachari as required by section 209 of the Criminal Procedure Code, he was expressly asked not to do so on the ground that the accused had agreed to give back the jewels. The Magistrate himself says that he thought there was no cause for taking any further action in the matter. It is difficult to believe that, if the Magistrate was approached in his official capacity and the object of Seshachari was to prefer a complaint, the Magistrate would have allowed the parties to compound the offence of theft and to leave the place quietly together. The evidence of Seshachari's son, to which I have referred, also shows that, after the failure of negotiations with the accused for the return of the jewels, he wanted to file another formal complaint before the Magistrate. Even assuming that Exhibit E was sufficient as a complaint under section 199, Criminal Procedure Code, of an offence under section 498 of the Indian Penal Code, I am of opinion that when the parties left the place together, the husband agreeing to drop the proceedings owing to his wife having agreed to give back the jewels, a fresh complaint would be necessary and that it is not open to persons after the husband's death to revive the proceedings which admittedly had been dropped. Having regard to the evidence in the case and the conduct of the parties, I am of opinion that there was no complaint under section 199, Criminal Procedure Code, such as would entitle the Magistrate to take cognisance of the case after the death of Seshachari. I would, therefore, quash the charge under section 498, Indian Penal Code.

As regards the charge of theft the second Class Magistrate had cognisance of the case and it is difficult to see how the Police, to whom the charge of theft was referred for inquiry and report, can change the forum by preferring a charge sheet before the Deputy Magistrate. The case ought to be formally transferred and till then I do not think the Deputy Magistrate had any jurisdiction to try it. I think that the proper course is to quash all proceedings taken by the Deputy Magistrate and to transfer the case, in so far as it relates to theft against the 1st

accused which was filed before the Sub-Magistrate, to the Deputy Magistrate for disposal.

Proceedings quashed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT NO. 206 OF 1914.

December 17, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

EMPEROR—APPICLANT

versus

DINO *walad* PIARO—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 565—High Court, power of, to pass order under, in appeal or revision.

Where a trying Magistrate, not especially empowered in this behalf, passed an order under section 565, Criminal Procedure Code, and directed a convict to notify his residence for a period of two years and the District Magistrate moved the High Court to pass such an order on revision:

Held, that the Magistrate's order being without jurisdiction must be quashed, but that as section 565, Criminal Procedure Code required that the order should be made by the trying Magistrate at the time of passing the sentence, the Appellate Court or the Court of Revision could not make an order under that section where the original Court was not so empowered.

Emperor v. *Bhausingh Dhumalsingh*, 1 Ind. Cas. 454; 8 Cr. L. J. 267; 33 B. 33; 10 Bom. L. R. 759; *Dharam Das* v. *Emperor*, 7 Ind. Cas. 412; 33 A. 48; 11 Cr. L. J. 480; 7 A. L. J. 910, referred to.

Report made by the District Magistrate, Nawab Shah, against the order of the Resident Magistrate, Naushahro.

Mr. *E. Raymond*, (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—The accused has been convicted in this case of the theft of a horse and was sentenced by the Resident Magistrate, Naushahro, to 18 months' rigorous imprisonment and was ordered under section 565, Criminal Procedure Code, to notify his residence for a period of two years.

The District Magistrate forwards the case under section 439 for revision and points out that the Magistrate was not empowered to make the order under section 565. The District Magistrate suggests that as the case was a proper one in which the order should have been made, we should cancel the Magistrate's order and make an order ourselves to the same effect.

The Magistrate's order must be quashed, for it was made without jurisdiction. But we regret we cannot substitute an order of our own for it. Section 565 requires that the order should be made by the trying Magistrate at the time of passing sentence. The section in that respect is similar to section 106, Criminal Procedure Code. This section was amended in the Code of 1898 by the addition of clause (B) in order to empower an Appellate Court or a High Court to make a similar order, and under this clause the High Court can make an order even when the original Court was not empowered: *Emperor* v. *Bhausingh Dhumalsingh* (1), and *Dharam Das* v. *Emperor* (2). The omission of similar provisions in section 565 leads to the inference that the Appellate Court or the Court of Revision cannot make an order under that section where the original Court was not so empowered.

We, therefore, make no such order and quash the order made by the Magistrate.

Order quashed.

(1) 1 Ind. Cas. 454; 8 Cr. L. J. 267; 33 B. 33; 10 Bom. L. R. 759.

(2) 7 Ind. Cas. 412; 33 A. 48; 11 Cr. L. J. 480; 7 A. L. J. 910.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 251 OF 1915.

April 6, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

NUR MUHAMMAD AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Confession—Confession implicating co-accused retracted at trial—Independent corroboratio n essential.

Where one of two co-accused makes a confessio n implicating the other co-accused as well, independen t evidence should be forthcoming to corroborate the confession in regard to each accused implicated. [p. 103, col. 1.]

Where *N* and *R*, husband and wife, were accused of the murder of *N*'s brother and *R* made a confession before the Committing Magistrate implicating her husband as well, but subsequently retracted the confession:

Held, that as there was no real corroboration of the retracted confession against *N* and against *R* herself there was merely the retracted confession corroborated solely by evidence of her absence from her house during the night of the alleged murder, the

accused were entitled to the benefit of the doubt and must be acquitted. [p. 103, col. 2.]

Appeal from an order of the Sessions Judge, Jhelum, dated the 27th February 1915, convicting the appellants.

Dr. *Muhammad Iqbal*, for the Appellants.

Mr. *B. Bevan Petman* (for the Government Advocate), for the Respondent.

JUDGMENT.—The appellants, Nur Muhammad and Rahmtan, husband and wife, have been sentenced to death for the murder during the night of 27th-28th November 1914 of Fazla, the real brother of the male appellant.

The motive is to be found in the partition of the family property; the land had been partitioned but Nur Muhammad had successfully resisted Fazla's claim to share in the *dhok* or outlying farmstead, the supposed scene of the murder, which lies some 200 *karms* from the main *abadi*.

The animosity engendered by Fazla's claim had long been smouldering, but the immediate cause of the offence is to be found in Fazla's construction on the day preceding the offence of a manger on that portion of the *dhok* occupied by appellant.

It is proved, nay, admitted that Fazla slept in a room of the *dhok*, with the male appellant.

Deceased was married, but his wife being of tender years had not yet joined him. On the last evening of his life he supped with his wife and parents-in-law, P. W. Nos. 2, 3 and 4, and then went off to sleep at the *dhok*. The next morning his body was found lying in a ravine 513 *karms* by a round-about route from the *dhok*. Near it were found a pair of shoes and a *pagri*.

There is no eye witness of the offence, but witnesses Nos. 2, 3 and 4 prove the standing cause of enmity and the immediate provoking cause of the murder.

Against *Musammat* Rahmtan there is no evidence except her admission made before the committing Magistrate on 3rd December 1914, after the prosecution evidence had been recorded.

In that statement she said that she and her husband had strangled Fazla with a rope, that they had then carried his body with the shoes and *pagri* to the ravine, and she explained the presence of marks of a bite on her wrist by saying that Fazla deceased had bitten her during the death struggle.

Thirteen days after she put in a petition, alleging she had made the admission under Police torture. She was at once examined and the medical witness deposes unhesitatingly that the blisters displayed on her neck as well as the circular mark on her wrist could not have been inflicted on the 2nd December, the date on which she alleges she was subjected to torture.

It is worthy of remark that *Musammat* Rahmtan had not been in Police custody after 2nd December 1914.

We have no hesitation in agreeing with the learned Sessions Judge that the injuries displayed by *Musammat* Rahmtan on 16th December 1914 were not the handiwork of the Police and the reason she offers for her alleged false admission is clearly untrue.

The medical evidence shows that the death of Fazla was due to strangulation.

The learned Sessions Judges holds that the retracted confession by *Musammat* Rahmtan was true and that it is corroborated as evidence against her husband by three main circumstances.

The *first* is that the body was viewed by the villagers from the cliff overhanging the ravine and only Nur Muhammad could identify it from that distance, the *second* is the production from his straw stack by the appellant Nur Muhammad of a blood-stained rag; the *third*, that the murder took place at the *dhok* where none but appellant and deceased lived.

The first item does not greatly impress us; the depth of the ravine was only some 30 feet and it is difficult to believe that from that distance Fazla's body was unrecognisable; in any case his brother would naturally recognise him with greater ease than persons who were not relatives. Moreover, a perusal of the Police diaries does not lend support to this story that the body was not recognisable from the top of the ravine. To this circumstance we attach little value.

To the recovery of the blood-stained rag the Sessions Judge attaches little independent value, but this circumstance, linked up with the immediate identification of the corpse from a distance of 30 feet, he regards of great weight. Now it is not suggested that this blood-stained rag was identifiable as the property of the appellants and it

seems unnatural that Nur Muhammad should have risked polluting his own clothes by taking it away and hiding it in his stack. It should be noted that his clothes were examined when he reached the *thana*, but were found to be free from blood-stains, his person also bore no marks of a struggle.

Moreover, a perusal of the Police diaries reveals that a blood-stained rag lay near the body when the Police arrived. What became of that rag? No further mention of it is to be found in the diaries and it was not sent up with the case. Why should two rags have been used to staunch the flow of blood from deceased's nostrils and why was one only secreted by appellant Nur Muhammad?

The alleged production of the rag by Nur Muhammad from the stack appears to be a very suspicious matter and cannot be relied on.

The Sessions Judge's first two corroborative factors appear then to have very little value.

General corroboration of the story told by *Musammat* Rahmtan is no doubt to be found in the statement of *Musammat* Khan Bano, her sister-in-law, that *Musammat* Rahmtan was away from the house for the greater portion of the night of the murder, but corroboration should be in regard to each accused implicated.

The third reason given by the learned Sessions Judge is that the murder certainly took place at the *dhok* where nobody but deceased and Nur Muhammad slept, and he arrives at this conclusion as to the scene of the murder on the strength of the Sub-Inspector's deposition that the soles of the corpse were smeared with cowdung, and that near the bed in the *dhok* was a patch of wet cowdung on which were foot prints.

Now the Sub-Inspector is the only witness of this important point and the diaries do not bear him out.

We find in the diaries that only one foot of the corpse was smeared with cowdung, further that no mention of a wet patch is made.

There were some foot marks in the ravine and on the floor of the *dhok*, but there is no evidence that they could be identified with the footprints of either appellant.

This factor too is thus shorn of all its value. Now deceased is said to have had an intrigue with the wife of Din Muhammad, and Din Muhammad was mentioned in the first report as a suspect. Din Muhammad's wife is *Musammat* Fatma, the sister of *Musammat* Rahmtan, and when the investigation opened it was ascertained that Mehdi, brother of *Musammat* Rahmtan, had left that morning on no intelligable errand and though sought for could not be found by the Police.

Thus it is possible that Din Muhammad and Mehdi were the culprits.

For the appellants it is urged that the admission of *Musammat* Rahmtan is meagre and unconvincing, the rope, the alleged lethal instrument, has not been produced and she may have been induced to implicate herself and her husband in order to screen her brother.

The admission is certainly not very rich in details of what preceded the strangling and it seems strange that the bite on the back of the wrist of *Musammat* Rahmtan should have been merely a set of small bruises and not penetrating injuries.

Thus against Nur Muhammad we have no real corroboration of the retracted confession, whilst against Rahmtan there is merely the retracted confession, corroborated solely by the evidence that she was absent from her house during the night.

No doubt there is grave suspicion that the appellants were privy to the murder, but there is no reliable evidence as to the scene of the murder or of their complicity in the deed.

In the circumstances, appellants must be given the benefit of the very real doubt that exists.

The appeal is accepted and they are acquitted.

Appeal accepted.

SIND JUDICIAL COMMISSIONER'S COURT.

CONFIRMATION CASE NO 23 OF 1914.

CRIMINAL APPEAL NO. 114 OF 1914.

December 3, 1914.

Present:—Mr. Pratt, J. C., and Mr. Fawcett, A. J. C.

DARHOON *walad* KHUDA BUX—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *ss.* 299, 300 (3), 304—*Murder, culpable homicide not amounting to—Injuries inflicted not sufficient but likely to cause death—Offence.*

Where the injuries proved to have been inflicted were found not sufficient in the ordinary course of nature to cause death, but quite likely to have produced death:

Held, that the offence committed did not amount to murder, but only to culpable homicide not amounting to murder. [p. 104, col. 2; p. 105, col. 1.]

Appeal against the decision of the Sessions Judge, Larkana.

Mr. *Kimatrai Bhojraj*, for the Appellant.

Mr. *E. Raymond* (Public Prosecutor for Sind), for the Crown.

JUDGMENT.

PRATT, J. C.—The accused has been convicted by the Sessions Judge, Larkana, and sentenced to death. The accused had a quarrel with the deceased and is said to have attacked him on his way to the village of Bhuti where he was going to fetch home his wife. The accused suddenly emerged from some "Lai" bushes and gave the deceased a severe beating with a *lathi* which led to death 18 days later. I have no doubt on the evidence that the case of the prosecution is proved and that the accused was really the assailant of the deceased. There was an eye-witness to the beating called Lutif Ali. His evidence has been impugned, on the ground that he took no steps to succour the deceased who was lying injured in a pool of water. But the witness is only an ignorant goat-herd and the apathy of this class of witnesses as to matters which do not affect them personally is well known. In the interval between the beating and his death the deceased repeatedly named the accused as his assailant. He told this to the *banian* Phagun and also to his father-in-law, Khananshah, and his brother-in-law, Dinal Shah. The deceased made a dying declaration before the Magistrate in which he gave a long and detailed account of the assault. I have no doubt as to the truth of the declaration. There is a faint suggestion that the real offender was the father-in-law, Khananshah. I think it quite impossible that Khananshah, if he had been the real murderer, would have the courage to bring his victim to the Police Station, nor is it credible that the deceased knowing that he was beaten by Khananshah should deliberately make a false statement against an innocent man.

On the other hand I do not think that the offence amounts to a murder. The Doctor does not say that the injuries were sufficient in the ordinary course of nature to cause death. All he says is that it is quite likely that all the injuries would have produced death. This is the degree of probability referred to in section 299 only and falls short of that defined in section 300 (3). The Sessions Judge seems to have accepted the Doctor's estimate, for he says that the intention of the accused was at any rate to cause such bodily injuries as he must have known to be likely to cause death. Again, applying the test referred to by Melvill, J., in *Reg.* v. *Govinda* (1), the nature of the weapon used does not lead to the inference that the accused's intention was murder, for the injuries were inflicted with a stick measuring 3 inches in circumference. No doubt a large number of blows inflicted by a light stick might indicate an intention to cause bodily injuries sufficient in the ordinary course of nature to cause death. But there should be clear medical evidence to support such an inference and such evidence is in this case wanting.

I would, therefore, alter the conviction of murder to one of culpable homicide not amounting to murder under section 304, part 1, and reduce the sentence to one of transportation for life.

FAWCETT, A. J. C.—I concur in holding it fully proved that the deceased's injuries, which led to his death, were inflicted by the appellant. I have felt some doubt whether, having regard to the number and nature of the injuries inflicted on the de-

(1) 1 B. 342.

ceased, the case does not fall under the third clause of the definition of murder in section 300, Indian Penal Code. But the evidence of the Sub-Assistant Surgeon is not quite clear on the point whether the injuries were sufficient in the ordinary course of nature to cause death; and, though I am inclined to think he probably meant this, yet the fact that he has not clearly said so is one which should be taken in the accused's favour, as a point of this kind in a murder case should not be left in any doubt and this Court in a case of this kind should lean in *Favorem Vitae*. There are also circumstances which justify the view that the injuries themselves may not alone have been sufficient to cause death. For instance the enlarged spleen of the deceased points to the probability of his suffering from malaria.

I, therefore, concur with my learned colleague in altering the conviction to one under section 304, Indian Penal Code, and the sentence of death to one of transportation for life.

Conviction altered.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 892 OF 1914.

April 8, 1915.

Present:—Justice Sir Donald Johnstone, KT. and Mr. Justice Shadi Lal.

DAULAT RAI—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 409, 477A—Managing Director of Bank deceiving share-holders as to the real profits—Wrongful personal gain—Falsification of balance sheet—Balance sheet, whether a "writing" within the meaning of the section—Compensation to share-holders—Companies Act (VI of 1882), s. 214.

Where the accused, the Managing Director of the Hindustan Bank, wishing the Bank to make a better show than the real facts of its working would warrant, in order to maintain the confidence of the share-holders and the public and so to make possible a project for increasing largely the Bank's capital, on the 17th December 1912 got his son to present a pro-note for Rs. 3,000 to the Bank, treated this Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing on paper to that extent his remuneration account for Rs. 4,050, which he had actually drawn, to Rs. 1,050 and thus deceiving the share-holders at their general meeting in the following March as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent. which would otherwise have been the most possible:

Held, (1) that the accused was guilty under section 409 of the Penal Code, because being entrusted with the property of the Bank, he dishonestly used and disposed of some of that property contrary to the Bank's Articles of Association causing the share-holders to declare a dividend larger than the profits warranted. [p. 107, col. 1.]

Emperor v. *Rash Behary Das*, 35 C. 450; 12 C. W. N. 58; 7 Cr. L. J. 378; *Jyotish Chandra Mukerjee* v *Emperor*, 4 Ind. Cas. 416; 14 C. W. N. 82; 10 Cr. L. J. 581, *Queen-Empress* v. *Moss*, 16 A. 88; A. W. N. (1894) 23, distinguished.

(2) that both the Managing Director and the Manager of the Head Office were guilty under section 477A of the Penal Code as they had "falsified" the balance sheet of 1912 and the books of the Bank by showing as profits Rs. 3,000 which were not profits, the falsification being nontheless complete because they had first manufactured pro-notes, etc., in order to give to the falsified balance sheet and books an appearance of correctness. [p. 107, col. 2.]

Queen-Empress v. *Moss*, 16 A. 88; A. W. N (1894) 23, referred to.

(3) that a Bank's balance sheet is a paper or writing belonging to the Bank; and [p. 107, col. 2.]

(4) that the Director was guilty of "misfeasance" "and breach of trust" and by inducing the share-holders to pay a dividend partly out of what was really capital he "misapplied" the Company's money and, therefore, could be compelled by the Court to contribute a reasonable sum by way of compensation. [p. 108, col. 1.]

Appeal from an order of the Magistrate, first Class, exercising enhanced powers under section 30, Criminal Procedure Code, Multan, dated the 4th November 1914, convicting the appellant.

Messrs. *Kirkpatrick*, *Parker*, *Obedulla* and *Rughunath Sahai*, for the Appellant.

Mr. *Broadawy*, Assistant Legal Remembrancer, for the Crown.

Mr. *Mohendra Nath Banerji*, for the Liquidator.

JUDGMENT.—This appeal and 889 of 1914 can conveniently be disposed of together. They were argued before us at great length, but we do not think any very protracted discussion is here required. Our final opinion on both cases is that the accused are certainly guilty as charged, Daulat Rai under section 409, Indian Penal Code, and section 477A, Indian Penal Code, and Hari Chand with abetment under each head; but that the sentences are in all the circumstances unnecessarily severe.

Daulat Rai was Managing Director of the Hindustan Bank, Multan, and Hari Chand, Manager of the Head Office there. The charges are very explicit as regards Daulat Rai. The *first* is that in the year 1913 he caused to be paid as dividend to

shareholders (of whom he was one himself) Rs. 3,000 in excess of profits and "thus dishonestly misapplied money against the terms of Articles of Association and against legal directions prohibiting payment of dividend from any money other than profit"; and the *second* charge is that, in order to prepare the way for the above misapplication of money, he did "on or about 17th December 1912", cause to be falsified (1) the balance sheet for 1912 by causing to be shown Rs. 1,050 only as his remuneration instead of Rs. 4,050, and (2) the account books of the Bank by debit and credit as between himself and his son, Nainsukh, and the Bank of Rs. 3,000 on the basis of a fictitious pro-note executed by his son. The way the date of the second charge is brought in is rather misleading. The gravamen of the whole charge really is that accused, wishing the Bank make better show than the real facts of its working would warrant, in order to maintain the confidence of the shareholders and the public and so to make possible a project for increasing largely the Bank's capital, on 17th December 1912 got his son to present a pro-note for Rs. 3,000 to the Bank, treated this Rs. 3,000 as a *pro tanto* addition to the profits for 1912 by reducing on paper to that extent his remuneration account from Rs. 4,050, which he had actually drawn, to Rs. 1,050, and thus deceiving the share-holders at their general meeting in the following March as to the real profits, induced them to declare a dividend of 6 per cent. instead of some 3 per cent., which would otherwise have been the most possible. For this pro-note there was really no security, Nainsukh being joint with his father and having at that time no independent resources whatever. Later, in January, *i.e.*, after the close of the financial year, the whole thing was re-adjusted, and matters returned to the *status quo ante* 17th December 1912, except that a small amount of interest stood to be charged against Nainsukh on the pro-note and a balance sheet could be framed on a profit some Rs. 3,000 in excess of the real profits.

This is the case for the prosecution shorn of details. The rival theory of the defence is that Daulat Rai's salary being Rs. 6,000 per annum, he had actually drawn in 1912 Rs. 7,850, of which Rs. 3,800 was on account of 1911 and Rs. 4,050 on account of 1912; that by a rule of the Bank he was not allowed to draw in any one year over Rs. 6,000 as remuneration, that before 17th December 1912 the Accountant, P. W. No. 6, intimated to him that he had overdrawn, but did not state the exact amount, that it was in order to satisfy the aforesaid Bank rule that he, not having money ready, got his son to execute the pro-note for Rs. 3,000, that in 1913 he was entitled to draw that Rs. 3,000 again as remuneration, which he did by simply showing the pro-note as paid up; and that there was no intention to deceive or defraud or act dishonestly.

It will be seen that there is no denial of the main facts stated by the prosecution. The intention to increase the capital of the Bank is admitted, as also the execution of the pro-note, the statement of profits in the balance sheet at the enhanced figure, the declaration of 6 per cent. dividend, and so forth. But the prosecution deny the story that the Accountant warned Daulat Rai of his excess drawing of remuneration and also deny the existence of the alleged rule limiting drawings in any one year to Rs. 6,000. In our opinion both these denials are fully justified by the record. There is no documentary proof of the warning, and it is impossible to believe that Daulat Rai would not, if so warned, have taken the trouble to inquire exactly what the excess drawing amounted to but would have hastily arranged for an adjustment to the unnecessary extent of Rs. 3,000, the real excess being only Rs. 1,850. The rule, too, has not been shown to have any existence. A little thought shows that it is an *impossible* rule; and examination of Exhibit P7, the accused No. 1's "remuneration account," as compiled by the Liquidator, further shows that more than once over Rs. 6,000 has actually been drawn by accused Daulat Rai in a single year—see 1909 and 1911 (Rs. 1,475 and Rs. 118 respectively in excess).

We must, therefore, reject the defence theory, and take the facts as stated by the prosecution as established. We also think that the accused's intentions were as stated by the prosecution, and it only remains to see how the facts *plus* intentions disclose offences under section 409 and section 477A

of the Indian Penal Code. Some minor points were argued before us, but we really do not see any need to discuss them, *e.g.* whether the Liquidator, who drew up Exhibit P7 and Exhibit P8, had authority from the Court to add the "Remarks" in the last column of the statement Exhibit P 8; that though there was no written rule* limiting drawings to Rs. 6,000 in any one year, this was the Accountant's (P.W No. 5) interpretation of Article 115 of the Articles of Association—an absurd explanation; that Daulat Rai might have drawn Rs. 3,000 against his cash credit (as Managing Director) of Rs. 25,000 and have used that money as he used the pro-note—a plan that would obviously not have served the purpose of inflating profits; that the Reserve Fund might have been drawn upon; that in December Daulat Rai could not have had any idea the real profits were going to be so low, which seems to us contrary to common sense and experience; that Hari Chand knew nothing of what was being done or of Daulat Rai's aims and intentions, a rather incredible proposition to put forward regarding the Manager of the Head Office.

We consider the accused Daulat Rai guilty under section 409, Indian Penal Code, because being entrusted with the property of the Bank, he dishonestly used and disposed of some of that property, namely, Rs. 3,000 which was not really profits, contrary to the Bank's Articles of Association (see Article 50) causing the share-holders by deception to declare a dividend larger than the profits warranted. Compare the above with section 405, Indian Penal Code, where "criminal breach of trust" is defined—"Whoever, being in any manner entrusted with any property.....dishonestly uses, or disposes of, that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, *express* or *implied*, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do." By his act he caused wrongful immediate gain to himself and the other share-holders to the extent of the enhanced dividend and so acted "dishonestly." It is idle to argue, as Mr. Kirkpatrick does, that the money was theirs and there could be no wrongful gain in their taking it. They and Daulat Rai were not private persons with no duty to their creditors: they and he were persons registered as a "limited" Company and admittedly under a legal obligation to take dividends only out of profits and he was under a legal contract to observe the Articles. Their property in the Bank, apart from profits, was not theirs to use as they liked. A few rulings have been quoted to us in connection with the legal aspect of this case, and we have noted them in the margin* (foot-note), but each case must depend on its own peculiar facts.

The second head of charge, as explained by us earlier in this judgment, is also fully made out. The accused were both officers or servants of the Bank. Their action was "wilful" and we think it was "with intent to defraud." The word "defraud" is not defined in the Code; but its ordinary meaning is clear enough, and after all if, as we have already found, the accused's action was *dishonest*, we need find no difficulty in importing into it also the idea of defrauding. Then the accused "falsified" the balance sheet of 1912 and the books of the Bank by showing as profits Rs. 3,000 which were not profits; and they falsified them nonetheless because they had first manufactured pro-notes and what not in order to give to the falsified balance sheet and books an appearance of correctness, See *Queen-Empress* v. *Moss* (1). As to the kind of documents covered by it section 477A is extraordinarily wide, "book, paper, writing, valuable security or document, which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer." We are unable to agree with Mr. Oertel (for Hari Chand) that a Bank's balance sheet is not a paper or writing belonging to the Bank, or that the Bank's books are not books belonging to the Bank.

We, therefore, uphold the convictions; but considering the comparative novelty of this sort of thing in the Punjab and our conviction that the experience of the past few years in these new fields of activity, coupled with moderate sentences, will prove a sufficient

*N. B.—It is admitted that Gurdial, D. W. No. 2, is incorrect in saying there was one.

(1) 16 A. 88; A. W. N. (1894) 23.

*Emperor v. *Rash Behary Das*, 35 C. 450; 12 C. W. N. 581; 7 Cr. L. J. 378; *Jyotish Chandra Mukerjee* v. *Emperor*, 4 Ind. Cas. 416; 14 C. W. N. 82; 10 Cr. L. J. 58; 36 C. 955; *Queen-Empress* v. *Moss*, 16 A. 88; A. W. N. (1894) 23.

deterrent for the future, we accept these two appeals and reduce the sentences in the case of Daulat Rai (from seven years and Rs. 15,000 fine) to four years' rigorous imprisonment and a fine of Rs. 6,000 (one year's salary), or in default 18 months' rigorous imprisonment; and in the case of Hari Chand from two years' rigorous imprisonment to one year. In both cases the imprisonment to count from date of arrest.

An application has been made to us that the fine, in whole or part, should be awarded to the Bank, now under liquidation, for the benefit of its share-holders or creditors. Such an order could hardly be passed under section 545 (1), Criminal Procedure Code, for the "expenses" mentioned in sub-section (1) (*a*) appear to have been borne by Government, while as to clause (*b*) it is doubtful whether the Company could have sued Daulat Rai for damages on the facts of this case. But however this may be, we think that under section 214, Act VI of 1882, we can award to the Company damages by making the fine mentioned above over to the Liquidator for the benefit of the Company. By the devices adopted by him he was guilty of "misfeasance" and "breach of trust"; by inducing the share-holders to pay a dividend partly out of what was really capital, he "misapplied" the Company's money, and this Court can, therefore, compel him to contribute a reasonable sum by way of compensation.

We, therefore, direct that the whole fine (Rs. 6,000), or so much of it as is recovered, be paid to the Liquidator on behalf of the Company as compensation.

Sentences reduced.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL TRANSFER APPLICATION No. 225 OF 1914.

January 12, 1915.

Present:—Mr. Pratt, J. C.

OTANDAS DWARKADAS – APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526 cls. (1) (a) & 8—Transfer of case—Fair and impartial inquiry—Reasonable apprehension.

Where an application was made by the accused to the trying Magistrate, before the commencement of the hearing, notifying his intention to move the High Court under section 526, Criminal Procedure Code, for transfer and praying for an adjournment for that purpose, but the applications was rejected and some condemnatory remarks were made in a superfluous order by the Magistrate against the accused:

Held, that the Magistrate was bound to grant the adjournment and that as these irregularities coupled with the condemnation of the accused appeared to have created a reasonable apprehension in the mind of the accused that a fair and impartial inquiry could not be had, the case ought to be transferred. [p. 109, col. 1.]

Application for transfer of a case from the Court of the City Magistrate, Shikarpur.

Mr. *F. J. De Verteuil*, for the Applicant.

Mr. *E. Raymond*, (Public Prosecutor for Sind), for the Crown.

JUDGMENT.—This is an application for transfer to any other Magistrate of a case pending in the Court of the City Magistrate, Shikarpur. The application is based on many grounds, most of which have been dropped in view of the Magistrate's report. Two of the remaining grounds disclose irregularities in the procedure of the Magistrate. The case was a simple case of wrongful restraint and was fixed for hearing on the 8th October. The accused moved the Court to grant an adjournment in order to enable him to apply under section 526 for transfer. The accused says that he made this motion before the hearing began. The Magistrate in his report does not state distinctly whether this was so or not. He reports that the application was made after the commencement of the case. But as the case had been put for preliminary inquiry, it is not clear what the Magistrate considered was the commencement of the case. A general and somewhat discursive order on various matters was recorded by the Magistrate on the 8th after recording some evidence and this order appears to refer to the application as having been made before the evidence was led on the 8th. I take it, therefore, that the application was made before the commencement of the hearing. This being so, the Magistrate was bound to make an order granting the accused such an adjournment as would enable him to make his application and obtain an order from the High Court before being put upon his defence. I do not say that he was bound to stay proceedings the instant the application was made. Nor do I think that such is the necessary inference from the decision of *Crown* v. *Naoo* (1). There as here the Magistrate rejected the application

(1) 1 S. L. R. 35; 9 Cr. L. J. 274.

without any qualification as to a future adjournment. It was open to the Magistrate to order that the necessary adjournment should be given after the examination of such witnesses as were in attendance. He, however, merely rejected the application. * * * *

These irregularities, coupled with the condemnation of the accused contained in the somewhat superfluous order recorded on the 8th October, do appear to have created a reasonable apprehension in the mind of the accused.

I accordingly order the transfer of the case to such other Magistrate as the District Magistrate, Sukkur, may direct

Case transferred.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 667 OF 1914.
CRIMINAL REVISION PETITION NO. 565 OF 1914.

March 26, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re S. KUPPUSAMI AIYAR—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 435—Charter Act, s. 15—High Court, power of, to quash proceedings at any stage—Penal Code (Act XLV of 1860), ss. 189, 504, offence under, essentials of—Abusing process-server, whether offence—Service of summons, when complete—Process-server, right of, to enter any house without permission.

A High Court has jurisdiction to interfere at any stage of the proceedings if it considers that, in the interests of justice, it should do so. [p. 110, col. 2.]

Before an offence under section 189 of the Indian Penal Code can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function. [p. 110, col. 2]

The mere fact that the accused abused the process-server will not constitute an offence under section 189 of the Indian Penal Code, nor will it constitute an offence under section 504 of the Indian Penal Code without an intention to cause a breach of the peace or knowledge that a breach of the peace is likely to result [p. 111, col. 1.]

Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference. [p. 111, col. 1.]

The fact of a subpœna being entrusted to a process-server does not give him a general right of entry into any house without obtaining the permission of the owner or person in charge. [p. 111, col. 1.]

Petition, under sections 435 and 439 o the Code of Criminal Procedure, 1898, praying the High Court to revise the order (charge) of the Court of the second Class Magistrate of Tranquebar, dated the 29th July 1914, in Calendar Case No. 229 of 1914.

The *Public Prosecutor*, on behalf of the Government.

Mr. *T. Ramachandra Aiyar*, for Messrs. *R. Sadagopachariar* and *C. Rajagopala Iyengar*, for the Petitioner.

ORDER.—This is an application under section 435 of the Code of Criminal Procedure and section 15 of the Charter Act, praying that the charge framed against the petitioner by the second Class Magistrate of Tranquebar may be quashed.

The case for the accused is that he was charged under sections 189 and 504 of the Indian Penal Code, that the evidence on record is insufficient to substantiate either of the charges and that the proceedings were instituted out of pure malice and with the object of harassing the petitioner.

A preliminary objection has been taken by the Public Prosecutor as to the maintainability of the petition and the power of the High Court to interfere. So far as the power of the High Court is concerned the point seems to be concluded by authority. In *Chandi Pershad* v. *Abdur Rahman* (1), it was held that the High Court had power to interfere at any stage of a case if it considers that the grounds have been made out for interference. Their Lordships at page 138 observe as follows :—" We feel bound to say that Mr. Pugh did not attempt to contend that the charges framed against Chandi Pershad could be sustained. He rather confined himself to urging the impropriety of our interference at a time when the case is still pending before the Magistrate. There can be no doubt, however, that we have the power to interfere at any stage of the case, and when it is brought to our notice that a person has been subjected for over two months to the harassment of an illegal prosecution, we think it is our bounden duty to interfere." In *Choa Lal Dass* v. *Anant Pershad Misser* (2), it was held that the Court had power to interfere in any case and at any stage and the above passage

(1) 22 C. 131.
(2) 25 C. 233.

from *Chandi Pershad* v. *Abdur Rahman* (1) was approved. While admitting the general power of the High Court, their Lordships state that the interference should be rare and only in exceptional cases and that the safe practical test would be to see whether a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the Court that it is a fit case for interference at an intermediate stage. In *Jagat Chandra Mozumdar* v. *Queen-Empress* (3), the power of the High Court to interfere in any case and at any stage was referred to and their Lordships found that in cases where there is some manifest and patent injustice apparent on the face of the proceedings calling for prompt redress the High Court has power to interfere. Their Lordships quashed the proceedings in the particular case, as they were of opinion that "it is clearly most unfair to the accused that he should not be called upon to rebut a charge which, upon the evidence, is baseless in so far as it affects him." In *Queen-Empress* v. *Nageshappa Pai* (4), it was held that the High Court could interfere with an interlocutory order passed by a Magistrate and Mr. Justice Ranade observed as follows:— "A preliminary objection was raised by the Government Pleader that as the proceedings before the Magistrate were still pending, this Court could not interfere with an order passed by the Magistrate in an interlocutory stage. The words used in section 435 of the Code of Criminal Procedure are, however, very general, and empower the High Court to send for the record of a case not only when it wishes to satisfy itself about the correctness of any finding, sentence or order, but also as to the regularity of any proceedings in Subordinate Courts. In *Abdool Kadir Khan* v. *Magistrate of Purneah* (5), the High Court of Calcutta expressly ruled that it had jurisdiction to revise interlocutory orders. This power was again exercised by the same Court in respect of an illegal Municipal prosecution—*Chandi Pershad* v. *Abdur Rahman* (1). We follow these decisions and overrule this preliminary objection urged by the Government Pleader.

There can thus be little doubt that, though the power has to be exercised with great care, the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that, in the interests of justice, it should do so. No hard and fast rule can be laid down as regards the class of cases in which the High Court will interfere.

In the present case the accused is charged with offences under sections 189 and 504 of the Indian Penal Code.

A careful consideration of the evidence adduced by the prosecution and the Exhibits filed in the case leads me to the conclusion (1) that the ingredients necessary to constitute an offence under sections 189 and 504 have not been made out, and (2) that the case as presented to the Court bears considerable evidence of fabrication and that the development that the case has undergone from the date of the first report of the process-server dated 21st April 1914 shows that this is not a *bona fide* prosecution but that the complainant is a tool in the hands of others.

The case for the prosecution is that the accused (who is a respectable Pleader) obstructed the service of summons on his father, whom he had subpœnaed as a witness for his client. There is absolutely no motive suggested why accused should have done so and the whole story is on its face improbable.

Before an offence under section 189 of the Indian Penal Code can be made out, it must be shown that there was a threat of injury to a public servant for the purpose of inducing him to do any act or forbear or delay to do any act connected with the exercise of his public function.

In the present case it is admitted that the summons was tendered to the witness before the accused appeared on the scene. Though the complainant does not stick to one story as to when the witness signed his name, there can be little doubt that he was served with the summons. I cannot help observing that the story told by the prosecution 1st witness bears considerable traces of addition and improvement if reference be made to his sworn endorsement on the complaint. The endorsement shows that summons was served in the house of the accused and that there was no threat of violence but only abuse. The whole

(3) 26 C. 786; 3 C. W. N. 491.
(4) 20 B. 543.
(5) 20 W.R. 23 Cr.; 11 B. L. R., Ap. 28.

of the story about the street scene, which is inconsistent with the version in the endorsement on the summons, is an afterthought and in my opinion false.

There is nothing to show that the accused intended to obstruct service or as a matter of fact obstructed it. Service of summons is complete when it is tendered to the witness and his refusal to sign the original makes no difference. Rule 10 of Order V of the Code of Civil Procedure states that service of a summons shall be made by delivery or *tendering a copy* of a summons. If the party refuses to sign the acknowledgment, all that the process-server has to do is to affix it. Rule 8 of Order XVI of the Code of Civil Procedure enacts that service of summons on witnesses shall be in manner prescribed in Order V.

The endorsement on the summons is to the effect that after tender of summons to the witness the accused came up, abused the process-server and asked him to get out of the house and that the witness immediately afterwards received the summons and *batta* and signed his name. Assuming that accused abused the process-server, it will not constitute an offence under section 189 of the Indian Penal Code.

As regards the charge under section 504, mere abuse will not do without an intention to cause breach of the peace or knowledge that a breach of the peace is likely. There is nothing to show that the accused had any such intention or knowledge. The endorsement on the summons does not warrant any such inference.

It appears from the subpœna that it was to be served on the witness who is described as residing at No. 6, Pattamangalam Agraharam, Kasba Mayavaram. The process-server had power to enter that house in order to effect service. He, however, went inside the house of the accused in Vellalar in Koil Rettai Street without permission and the accused is said to have abused him and asked him to get out.

I do not think that the fact of a subpœna being entrusted to a process-server gives him a general right of entry into any house without obtaining the permission of the owner or person in charge. Such a general power to enter any house at any time is not given by any of the provisions of the Code and would, in my opinion, be a serious violation of private rights. The mere fact that the owner asked the process-server to go out of his house would not be an offence. Assuming that the request to go out of the house was accompanied by the words "*Badava*, rascal", it cannot be said that the object or intention was to provoke a breach of the peace, however, improper the language may be.

The case was fully argued on both sides and giving it my best consideration, I am of opinion that this is a case where I ought to interfere. It is easy to see what injury is likely to be inflicted on a respectable Pleader by a vexatious and protracted, criminal trial. It may be that after a protracted trial the accused will be acquitted, but that does not appear to be a sufficient ground for not saving him from what I consider to be a groundless and vexatious prosecution.

I quash the proceedings in the lower Court.

Proceedings quashed.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 197 OF 1914.

November 12, 1914.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

MUHAMMAD IBRAHIM AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 122—Surety, evidence about fitness of, rejection of—Magistrate, duty of—Burden of proof.

The power of rejection of sureties conferred on Magistrates by section 122 of the Criminal Procedure Code, 1898, should not be used merely to prevent a '*badmash*' from giving security. [p. 112, col. 1.]

Although it is the duty of the accused to produce the evidence of the fitness of the surety, that burden is ordinarily discharged by the evidence of the surety himself. If the Magistrate is not satisfied with the evidence of the surety, that alone is not sufficient ground for rejection. Section 122 of the Criminal Procedure Code recognizes only one ground for rejection of the surety and the reason given by the Magistrate must be a positive reason for believing the surety to be unfit. If he is not so satisfied, he must make further inquiry and come to a definite conclusion one way or the other. [p. 112, col. 2.]

MUHAMMAD IBRAHIM *v.* EMPEROR.

Application for revision against an order of the Sub-Divisional Magistrate, Mehar.

Mr. *F. J. De Verteuil*, for the Applicants.

Mr. *E. Raymond* (Public Prosecuter for Sind), for the Crown.

JUDGMENT.—This is an application for revision of an order of the Sub-Divisional Magistrate of Mehar rejecting four sureties offered for two suspects, Mahomed Ibrahim and Abdul Hakim.

The order under section 118, Criminal Procedure Code, required that these suspects should execute bonds with three sureties each for a period of two years and was made on the 20th December 1913. The order required that the sureties should be of a class which fulfilled three conditions,

(*a*) that they should not be of inferior standingto the suspects;

(*b*) that they should be respectable;

(*c*) that they should be neighbours of suspects.

Condition (*c*) is reasonable: see *Imperator* v. *Manu* (1). Condition (*b*) is mere surplusage, for if a surety were not respectable that would be a personal disqualification. Condition (*a*) has been held to be valid in Revision Application No. 55 of 1914 [*Muhammad Ibrahim* v. *Emperor* (2)], though in my opinion the word "standing" is so vague that I doubt if it gives the suspect adequate and precise information as to the class of surety he should produce. At any rate some more precise definition of the class required would seem preferable. But it is settled in the same revision application that whatever else it may mean, it did not necessarily refer to a property qualification. The sureties rejected by the Magistrate were tendered under this order and the application stated that the sureties had brought their assessment books, had each land worth Rs. 1,000 besides moveable property and were willing and able to control the accused. Nevertheless the Magistrate dealt with the application in a summary manner, which indicates that he had paid little attention to the injunction given by this Court that the power of rejection should not be used merely to prevent a "*badmash*" giving security.

As to all the sureties the reason for rejection is that they have produced no evidence as to character. Now although it is the duty of the accused to produce the evidence of the fitness of the surety, that burden is ordinarily discharged by the evidence of the surety himself. If the Magistrate is not satisfied with the evidence of the surety, that alone is not sufficient ground for rejection. Section 122 recognizes only one ground, *i.e.*, "the ground that for reasons to be recorded by the Magistrate such surety is an unfit person." The reason given by the Magistrate must, therefore, be a positive reason for believing the surety to be unfit. It is not sufficient for the Magistrate to say that he is not satisfied with the evidence called by the accused. If he is not so satisfied, he must make further inquiry and come to a definite conclusion one way or the other. Two of the sureties, Sherkhan and Umer Usman, did call witnesses as to their character, but the Magistrate declined to consider their evidence as they were themselves tendered as sureties. It is unfortunate that the Magistrate should make a presumption against a witness's credibility merely because he has offered to be a surety for a bad character. The presumption ought to be the other way, for otherwise no respectable person will undertake the responsibility of being surety. As to Sherkhan, the Magistrate thinks he is not of equal standing to the suspects as he has only 16 acres of land, but it has been decided that that qualification does not necessarily or exclusively refer to property. As to Yusif Bhambe, the Magistrate says that he has only 8 acres of land and not the means to pay the penalty of the bond, but he has omitted to consider the moveable property of this surety.

These four sureties, Sherkhan Bahikhan, Khan Mahomed Ghulamali, Umar Usman and Yusif Bhambe are neighbours of the suspects and there is nothing against their character, nor does their social standing seem inferior to that of the suspects.

We, therefore, direct the Magistrate to accept their bonds.

Order reversed.

(1) 1 S. L. R. 46; 8 Cr. L. J. 166.

(2) 27 Ind. Cas. 148; 8 S. L. R. 173; 16 Cr. L. J. 100.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2404 OF 1912.

January 12, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Napier.

THUVOOR VENKATASUBBA REDDY—PLAINTIFF—APPELLANT

versus

BAGIAMMAL—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 82—Contribution—Properties of two owners mortgaged to secure one debt—One owner and his property, release of, on payment of one-half of debt—Major portion of property released—Liability of other mortgagor and remaining portion of mortgaged property.

Where properties of unequal value belonging to two owners were mortgaged to secure a single debt and the mortgagee, on receiving one-half of the mortgage amount from one of the mortgagors released his portion of the mortgaged properties, which were of higher value, and sought to realise the balance of the mortgage amount from the remaining properties belonging to the other mortgagor:

Held, that he was entitled to do so and that the suit properties were liable to be sold for the whole of the balance remaining due upon the mortgage and not only to contribute rateably towards the mortgage-debt. [p. 115, col. 2; p. 119, col. 1.]

Krishna Ayyar v. *Muthukumarasawmiya Pillai*, 29 M. 217 and *Mir Esuff Ali Haji* v. *Panchanan Chatterjee*, 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C. L. J. 639, distinguished.

Ponnusami Mudaliar v. *Srinivasa Naicken*, 31 M. 333; *Norendra Nath Sircar* v. *Kamalbasini Dasi*, 23 C. 563; 23 I. A. 18; *Lala Dilawar Sahai* v. *Dewan Bolakiram*, 11 C. 258; *Roghu Nath Pershad* v. *Harlal Sadhu*, 18 C. 320; *Imam Ali* v. *Baij Nath Ram Sahu*, 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576 and *Webb* v. *Macpherson*, 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238 (P. C.), referred to.

Sheo Tahal Ojha v. *Sheodan Rai*, 28 A. 174 (F. B.); A. W. N.(1905) 244; 2 A. L. J. 630 and *Sanwale Singh* v. *Ganeshi Lal*, 20 Ind. Cas. 41; 35 A. 441; 11 A. L. J. 630, followed.

Per *Napier, J.*—A Court should not introduce such provisions as the Legislature has not thought fit to incorporate in Transfer of Property Act. [p. 117, col. 2.]

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 415 of 1911, preferred against that of the Court of the District Munsif of Sholingur, in Original Suit No. 547 of 1910.

FACTS.—The suit arose out of a mortgage executed by Arunachala Mudali and Sanjeevi Mudali for Rs. 1,800. The properties belonging both to Arunchala and Sanjeevi were comprised in the mortgage, the properties of Arunchala being of a higher value than those of Sanjeevi. In 1910, Arunachala paid one-half of the amount then due on the mortgage and the mortgagee released his properties from the mortgage. Sanjeevi having died in the meanwhile, the mortgagee instituted the present suit against the daughter-in-law of Sanjeevi for the recovery of the balance of the mortgage amount by the sale of the properties of Sanjeevi alone. Arunachala was not made a party to this suit. The defendant mainly contended that the suit properties were only liable to contribute rateably towards the mortgage debt and that as the properties mortgaged were worth Rs. 5,550 and as the suit properties alone were only worth Rs. 1,020, she was only liable to pay a sum of Rs. 450 as and for her share of the mortgage-debt. Both the lower Courts upheld this contention. The plaintiff appealed.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant:—The plaintiff never intended to exonerate or did exonerate Arunchala or his properties. There is nothing in Exhibit B or in the plaint to support such a position and the finding of the lower Courts to that effect cannot be upheld. Assuming, however, that there had been such a release, even then the plaintiff is entitled to recover the balance of the mortgaged amount from the properties of Sanjeevi alone. *Vide* section 82 of the Transfer of Property Act. The observations in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) are only *obiter*. See also *Lala Dilawar Sahai* v. *Dewan Bolakira* (2) and *Roghu Nath Pershad* v. *Harlal Sadhu*(3) referred to in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1), which have taken the the contrary view. In *Sanwale Singh* v. *Ganeshi Lal* (4), the case of *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) was considered and the Court held that the mortgagee was at liberty to realise the mortgage debt from any portion of the mortgaged property. See also *Sheo Tahal Ojha* v. *Sheodan Rai* (5) for the same position.

Mr. *V. V. Srinivasa Aiyangar*, for the Respondents:—The lower Courts have found as a fact that the plaintiff had released his rights so far as Arunachala and his

(1) 29 M. 217.
(2) 11 C. 258.
(3) 18 C. 320.
(4) 20 Ind. Cas. 41: 35 A. 441; 11 A. L. J. 630.
(5) 28 A. 174 (F. B.); A. W. N. (1905) 244; 2 A. L. J. 630.

properties were concerned. *Vide* endorsement of payment on Exhibit A and the plaint. A release need not necessarily be in writing. The parties went to trial on the footing that there had been a release and it is too late for the plaintiff to go back. The words 'are mortgaged' in section 82 of the Transfer of Property Act mean 'are at the date of suit liable on an existing mortgage.' They cannot mean that the right to contribution arises where several properties are mortgaged. The mortgagee's releasing Arunachala has necessarily the effect of extinguishing the debt so far as he is concerned, with the consequence that the other mortgagor is debarred from getting contribution from him. In consequence of this disability an equity arises in favour of the other mortgagor limiting the mortgagee's right to rateable contribution from him. The lower Courts were, therefore, right in basing their decision on the cases reported as *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) and *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6). See also *Ponnusami Mudaliar* v. *Srinivasa Naickan* (7) and *Imam Ali* v. *Baij Nath Ram Sahu* (8).

Mr. *L. A. Govindaraghava Aiyar*, in reply:—The equity sought to be invoked in favour of the defendant is against the spirit of the Transfer of Property Act. Section 68 of that Act directly negatives such a contention and gives the mortgagee unrestricted liberty to realise the mortgage money from any portion of the mortgaged property. There is nothing in section 67 limiting that right. See also sections 43 and 44, Contract Act. As regards the applicability of the equity itself see *Norendra Nath Sircar* v. *Kamalbasini Dasi* (9) and *Webb* v. *Macpherson* (10). The case of *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) only holds that as between the mortgagee and holder of equity of redemption, the former is not bound to distribute his debt rateably. The case of *Ponnuswami Mudaliar* v. *Srinivasa Naicken* (7) also concerns the rights of an assignee of equity of redemption. Even in the case of *Mir Esuff Ali Haji* v. *Panchanan Chatteriee* (6), such a principle has been held to be inapplicable to cases of mortgagor and mortgagee. Vide *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6).

(6) 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C.L.J. 639.
(7) 31 M. 333.
(8) 33 C. 613; 10 C. W. N. 551; 3 C. L. J. 576.
(9) 23 C. 563; 23 I. A. 18.
(10) 31 C. 57; 5 Bom. L. R. 838; 8 C. W. N. 41; 13 M. L. J. 389; 30 I. A. 238 (P. C.).

JUDGMENT.

SPENCER, J.—In this case the separate properties of two owners were mortgaged to secure a single debt of Rs. 1,800. One of the mortgagors, Arunachala Mudali, paid up Rs. 1,631-14-0 and the mortgagee sought in this suit to recover the whole of the balance from mortgaged properties in the possession of the other mortgagor. The lower Courts refused to allow the plaintiff to recover more than what the property he proceeded against was rateably liable for.

The questions for our decision are, (1) whether there was in law an extinguishment of the mortgagee's lien over Arunachala Mudali's property, so as to preclude the plaintiff from recovering the whole of the balance due under the mortgage in this suit and the defendant from obtaining a contribution from Arunachala Mudali in a separate suit in proportion to the value his property bears to the whole debt secured by the mortgage. after deducting the amount already paid to the mortgagee; (2) whether assuming that it was understood by the parties that plaintiff released his right to proceed against Arunachala Mudali's property, this will prevent him from recovering the whole debt from the defendant. The statement in paragraph 6 of the plaint that Arunachala Mudali cleared off a portion of the interest and principal due upon the mortgage and that accordingly his properties have been *excluded from the suit* as arranged, does not in my opinion amount to an extinguishment of the mortgage lien over Arunachala Mudali's property.

No doubt there are words in Exhibit B showing that plaintiff at one time had an idea of relinquishing his lien over Arunachala Mudali's property, but as it was not a completed transaction and the document contains an admittedly false recital as to the payment of Rs. 1,621 in cash, it cannot affect the equities existing between the parties. Exhibit B, therefore, does not help the defendant as containing an admission of plaintiff that he had given up Arunachala Mudali's property. I consider the alleged extinguishment no proved, but as this is partly a question of fac upon which one of the lower Courts ha

pronounced in defendant's favour, I proceed to the second question.

Now as stated in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6). "It is a firmly settled doctrine that, as between the original parties, the release of a part of premises does not affect the lien of the mortgagee upon the residue, which is bound for the whole debt." There are no words in section 67 of the Transfer of Property Act to limit the mortgagee's right in this respect. Section 82 declares: "Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage." The effect of this and other sections relating to mortgages has been fully considered in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1), where it was held that there was nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. Reliance is placed by respondent's Vakil upon the *obiter dictum* at page 224: "It remains only to observe that, if the action of the mortgagee had the effect of extinguishing the mortgage lien upon any portion of the mortgaged property so as to relieve it from the liability to bear its proportion of the debt, he cannot recover more than what the property he proceeds against would be rateably liable for." The learned Judges were here dealing with an argument advanced on behalf of subsequent purchasers. The decision in *Ponnusami Mudaliar* v. *Srinivasa Naicken* (7) is also one relating to the rights of assignees of the equity of redemption. As observed by the Calcutta High Court in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6), 'the principle has no application as between the mortgagor and the mortgagee when the rights of no other person intervene and require protection." The decision in *Sanwale Singh* v. *Ganeshi Lal* (4) is to the same effect. I express no opinion as to the rights of subsequent transferees with or without notice. It was not necessary to join Arunachala Mudali as a party to this suit and there has been no application to have him made a party. He is not a person interested in the property which is the subject of this suit. Vide *Krishna Ayyar* v. *Muthukumarasawmiy Pillai* (1) and *Ponnusami Mudaliar* v. *Srinivasa Naicken* (7).

I consider for these reasons that the appeal should be allowed and that the appellant should be given a decree for sale of the plaint-mentioned properties for the whole of the balance due upon this mortgage with interest up to the date fixed for payment, and that he should recover his costs from the respondent throughout.

Time six months from this date.

NAPIER, J.—Two questions are raised in this appeal : *First*, whether the plaintiff has in fact extinguished the liability on the property of Arunachala Mudali under his mortgage; and, *secondly*, whether, if he has in fact done so, he is only entitled to recover a rateable proportion of the mortgage amount from the mortgaged properties in the possession of the defendant. The original liability arose on a simple mortgage executed on the 9th March 1898 by Arunachala Mudali and Sanjeeva Mudali, the father-in-law of the defendant (the mortgage amount being Rs. 1,800) with interest at 12 annas per cent. per mensem. Both executants mortgaged distinct items of the property belonging to each of them to cover the joint debt, and it is admitted that Arunachala Mudali, one of the original mortgagors, paid a sum of Rs. 1,631-14-0 in August 1910, which amount represented half the then existing liability. The plaintiff then brought a suit to recover the balance against the defendant and not making the co-mortgagor a party defendant, alleging that, in consequence of his having paid a sum of Rs. 1,631-14-0 to the plaintiff, he and his property out of the hypotheca were excluded from the suit, as was arranged with him. The defendant set up in paragraph No. 10 of the written statement that she was not liable for this balance of Rs. 1,600, as the plaintiff was bound to apportion the mortgage amount rateably on the value of all the mortgaged properties and, as Arunachala Mudali's properties were worth Rs. 5,550 and her property only Rs. 1,020, she was only liable for an amount of Rs. 450 as her share. The issue framed on this plea is : "Whether the plaint propertsie

are liable to be sold only for a rateable amount due, as the plaintiff has exonerated the other mortgagor and his properties." The District Munsif held in favour of the defendant on this issue.

On appeal to the District Court two points were taken, *first*, that the lower Court had erred in holding that the non-inclusion of Arunachala Mudali, the co-mortgagor, and his properties operated as an extinguishment of the mortgage to that extent: and, *secondly*, that the plaintiff was entitled to recover his debt on any portion of the mortgaged properties. Before the District Court the first point seems hardly to have been pressed: for the learned Judge states that the only question argued in this appeal related to the second point, it having been assumed that the plaintiff had exonerated the other mortgagor and his properties.

A long and careful argument has been addressed to us by Mr. Govindaraghava Aiyar urging that the plaintiff did not intend, by the language used in his plaint, to allege that he had exonerated the other mortgagor and his properties. I am unable to accept this contention. It is clear to me from the language of the plaint that the parties went to trial on this footing and, seeing that there can be an oral release, I accept the finding of both Courts that there had been such a release and that the endorsement on Exhibit A of the payment is evidence of that release.

Assuming, therefore, that the plaintiff had discharged one of the mortgagors from liability under the mortgage by receipt of half the amount due, the question remains whether he is thereby debarred from seeking to recover more than a rateable proportion of the balance from the co-mortgagor Both Courts have held that he is so debarred, relying on the language of *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) and also on the *dictum* of Mookerjee, J., in *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6). The language used by the learned Judges on page 224 is as follows:—"It remains only to observe," etc. It is to be noted that in the view of the learned Judges the limitation of the mortgagee's rights arises where his action has had the effect of relieving the discharged property from its liability to bear its proportion of the debt; and the argument addressed to us is based on the assumption that section 82 of the Transfer of Property Act, which creates the right to contribution, does not apply where one of the mortgaged properties has, at the time of the suit, been discharged from liability. The words are: "Where several properties are mortgaged to secure one debt, such properties are liable to contribute rateably to the debt." It is argued that the words "are mortgaged" mean "are, at the date of suit, liable on an existing mortgage," and that they cannot be read as meaning "where several properties have been mortgaged to secure one debt the right to contribution arises" and that, therefore, the mortgagee having put it out of the power of one mortgagor to get contribution, an equity arises in favour of the remaining mortgagor which limits the mortgagee's right to rateable contribution. It is, to my mind, a little difficult to see how a mortgage can be extinguished so as to prevent contribution but be kept alive for the purpose of ascertaining rateable proportion. But I do not think it necessary to decide here whether the right of contribution has, in fact, been lost. That question may arise in another suit. I am unable, however, to accept the view that even if it is lost, this right of equitable limitation exists. It seems to me that we should be very slow in introducing equities into the statutory mortgage law of this country, based on equitable doctrines applied to English mortgagors. The right of contribution is itself an equity, and an equity specifically introduced by Statute. If, under the English Law of mortgages, there is an equitable limitation to the mortgagee's right, it was perfectly open to the framers of the Act to introduce that equity by suitable provision. They have not chosen to do so and in my humble opinion, it is not the function of the Courts to do so for them. The learned Judges in *Krishna Ayyar* v. *Muthukumarasawamiya Pillai* (1) examine the provisions of the Transfer of Property Act with great minuteness. They point out that there are only 4 or 5 sections which need be considered, namely, sections 56, 81, 82, 95 and 60 and conclude as follows:—"It is scarcely necessary to say that there is nothing in any of these sections suggesting the view that as between a mortgagee in the position of the plaintiff and holders of the equity of redemption, such as the appellants

are, the law compels the former to distribute his debt, upon the mortgaged property rateably so as to entitle the latter to insist upon their interest not being proceeded with until after the nephew's one-third share has been proceeded against." Section 81 deals with marshalling; section 82 is the contribution section. Section 95 creates a charge by a co-mortgagor, who has redeemed the whole debt, on the share of the other co-mortgagors in the property for their due proportion; section 60 states the rights of a mortgagor to redeem; section 56 gives a right to a purchaser of one of two properties subject to a common charge, as against the seller, to have the charge satisfied out of the other property as far as such property will extend. It is to be noted that sections 56, 81, 82 and 95 are statutory equities in favour of persons owning properties liable to a charge against other persons and other properties equally liable on that charge. It has not been argued, and it cannot be argued, that any of these provisions raises the equity sought for here. The first difficulty in the way of this equity seems to me to be this. If the equity can be used as a defence to a mortgage suit, it obviously should be available to a mortgagor in a redemption suit; for it is illogical to say that the mortgagee cannot claim more than a rateable proportion, but that the mortgagor in a suit to redeem would have to pay the whole amount. Therefore, the right must be exercisable in redemption. Unfortunately, however, the Transfer of Property Act is definite in negativing this right. Section 60 gives a right to the mortgagor to redeem *on payment of the mortgage money* and specifically provides that nothing in the section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of the proportionate amount of the money remaining due on the mortgage, except where a mortgagee has acquired another such share. Here is to be found the only statutory limitation to the liability of the mortgagor to pay the whole amount due on the mortgage, if he seeks to redeem. Section 67 states the rights of the mortgagee. It gives a right to a foreclosure, or an order for sale, to the mortgagee as long as the mortgage money has not been paid. Among all the following sections from 69 to 84 there is not a single provision limiting the right of the mortgagee to recover the amount of his mortgage from any property made liable thereto by the mortgage document, except where he has lost his priority by fraud, misrepresentation or gross neglect, and except as to the right of a second mortgagee without notice of a former mortgage to have the securities marshalled so as to protect himself as far as possible. It is clear, therefore, that this equitable limitation of the mortgagee's right is one which is directly opposed to the language of various sections, introduces a right in the mortgagor impliedly negatived by section 60, and is, of course, in direct conflict with the rights and liabilities arising from the language of the document. When I am asked to read this equity into the Statute and am pressed with the language used by the learned Judges of this Court and of other Courts, I can only refer to the language of Lord Macnaughten in *Norendra Nath Sircar* v. *Kamalbasini Dasi* (9), adopting the language of Lord Herschell in the *Bank of England* v. *Vagliano* (11) which is in effect as follows, that the proper course is to examine the language of the Statute—uninfluenced by any considerations derived from the previous state of the law. If the Statute is intended to embody in a Code a particular branch of the law, the purpose of such Statute surely was that the law should be ascertained by interpreting the language used and not by enquiring how the law previously stood. Bearing in mind that the Chapter relating to mortgages in the Transfer of Property Act is as distinctly a 'Code" as any enactment could be, in that it begins by defining a mortgage, and seeing that its provisions contain several equities known to English Law I must, with the greatest deference to the views taken by the other Judges, decline to introduce provisions which the Legislature has not thought fit to incorporate in the Act.

I now proceed to consider the question from another point of view. The mortgage is a simple mortgage, under which each of the mortgagors bound himself personally to the mortgage money. Under section 68 of the Transfer of Property Act, the mortgagee has a right to sue the mortgagor *for the mortgage money* where the mortgagor has bound himself to re-pay the same. There is no equitable limitation here and a reference to the Contract Act shows that no such limita-

(11) (1891) App. Cas. 107; 60 L. J. Q. B. 145; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

tion can be introduced. Section 43 of the Indian Contract Act provides that any one of joint promisors may be compelled to perform the whole of the promise and section 44 specifically enacts that where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor. This is the very point under consideration in this case and it is to be noted that these two sections 43 and 44 give the right of contribution to joint promisors and also specifically provide that the release of a joint promisor by the promisee does not free such promisor from responsibility to the other joint promisors. I fail to see how it can be argued that a mortgagee in a mortgage suit can only ask for sale of mortgaged property for a rateable proportion of the mortgage debt, when on his claim on the covenant to pay he is entitled to judgment for the whole amount with, as a necessary corollary, a right to levy execution against the land. If there is an equity here, it operates strangely, for its only result will be, not to protect the mortgagor, but to give some advantage to a subsequent mortgagee, if there be one.

Reliance is placed on the view embodied in *Ponnusami Mudaliar* v. *Srinivasa Naicken* (7). There the learned Judges accept the statement of the law contained in Mr. Ghose's 'Law of Mortgages," dated 1875, prior to the Transfer of Property Act. With the very greatest deference, I cannot follow the Court in disposing of the case without reference to the provisions of the Act, but this case does not help the respondent as the proposition stated is covered by sections 56 and 81 of the Act. The learned Judges in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1), the case containing the *obiter dictum* relied on by the lower Court, quote with approval two cases, *Lala Dilawar Sahai* v. *Dewan Bolakiram* (2) and *Roghu Nath Pershad* v. *Harlal Sadhu* (3), which lay down that the mortgagee is entitled to realise the whole debt upon the whole property, the right to contribution being only as between the defendants, though they limit it in a manner expressly provided by section 81. The decision in *Krishna Ayyar* v. *Muthukumarasawmiya Pillai* (1) was considered by the High Court of Allahabad in a later case reported as *Sanwale Singh* v. *Ganeshi Lal* (4) and the Court adopted as correct the broad proposition, without any reservation, that where two properties are jointly mortgaged for the same debt, each of these properties is liable for the whole debt and it is open to the mortgagee to proceed either against the whole of the mortgaged property or against a part only of such property; and the proposition is stated equally broadly by a Full Bench of the same Court in an earlier case, *Sheo Tahal Ojha* v. *Sheodan Rai* (5). It is true that a different view appears to have been taken by the High Court of Calcutta in *Imam Ali* v. *Baij Nath Ram Sahu* (8). But there the learned Judges were considering the case of an assignee of the equity of redemption, a case which is covered by section 56 of the Act, and no authority on the construction of any section of the Act is quoted for the proposition stated on page 622 that "a mortgagee, who has a security upon two or more properties, which, he knows, belong to different persons, cannot release his lien upon the one so as to increase the burden upon the others, without the privity and consent of the persons affected." With the greatest deference, I know of nothing in the Act to support this limitation and it is to be noted that in a later case reported as *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (6) Mr. Justice Mookerjee, who was a party to the prior case, limits it specifically to cases where the release took place after the purchase of an interest in the mortgaged premises and considers it inapplicable to the case where the mortgagors alone were the persons affected by the release.

Nothing could be more definite than the following language used by that learned Judge in this last case: —

"It is a firmly settled doctrine that, as between the original parties, the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt (*vide* page 647)."

In this view I entirely concur, for the simple reason that, both by the language of the mortgage and the language of the sections of the Transfer of Property Act, no equity arises as between mortgagors and mortgagee which limits the mortgagee's rights, and I would refer the language used by Lord Davey in *Webb* v. *Macpherson* (10) with reference to an endeavour to apply

English equities to the Transfer of Property Act. The question arose as to a vendor's charge under the Act and the Board's view is stated on page 72. The English vendor's lien "was a creation of the Court of Equity, and could be modified to the circumstances of the case by the Court of Equity. But in the present case there is a statutory charge..... Such a charge, therefore, stands in quite a different position from a vendor's lien. You have to find something, either express contract or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the Statute."

What was sought to do in that case was certainly different to what is sought here. But it appears to me that the Privy Council were insisting in that case, too, on the construction of the Statute, apart from equitable principles introduced by Courts of Chancery in England.

For the above reasons I would reverse the decision of the lower Courts and make a preliminary order for sale as prayed for in the plaint.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 45 OF 1914.

March 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

P. M. A. VELLIAPPA CHETTIAR AND ANOTHERS—DECREE-HOLDERS—APPELLANTS

versus

S. N. SUBRAHMANIYAM CHETTY—JUDGMEMT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 24 (1) (b), 148—Civil Rules of Practice, r. 161A—Transmission of decree for execution by one Court to another—Transmission of that decree to another Court—No steps taken for six months to execute decree—Proceedings thereafter, whether void.

Where a public officer is directed by a Statute to perform a duty within a specified time, the provisions as to time are only directory. In considering whether a Statute is imperative, a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms. [p. 120, col. 1.]

Caldow v. *Pixell*, 2 C. P. D. 562; 46 L. J. C. P. 541; 36 L. T. 469; 25 W. R. 773, followed.

In deciding whether a rule is mandatory or directory, the possibility of justice suffering from a too rigid application of the time limit should be taken into account. [p. 120, col. 1.]

Queen v. *Ingall*, 2 Q. B. D. 199; 46 L. J. M. C. 113; 35 L. T. 552; 25 W. R. 57; *Brumfitt* v. *Bremner*, 9 C. B. (N. S.) 1; K. & G. 352; 30 L. J. C. P. 33; 7 Jur. (N. S.) 371; 3 L. T. 375; 9 W. R. 144; 142 E. R. 1; 127 R. R. 582; *Queen* v. *Lofthouse*, 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 145; 12 Jur. (N. S.) 619; 14 L. T. 359; 14 W. R. 649, followed.

A Court has under section 24, clause (1) (*b*) of the Civil Procedure Code, power to withdraw to its own file a transmitted execution proceeding and to dispose of it. [p. 120, col. 1.]

An omission to take within six months steps to execute a transmitted decree does not render the proceedings taken after six months infructuous and void *ab initio*. In such cases time is not of the essence of the stipulation. [p. 120, col. 1.]

Rule 161A of the Civil Rules of Practice, Madras, is a rule, of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute the decree. It is directory in its nature, and not mandatory. [p. 120, col. 2.]

Appeal against an order of the District Court of Ramnad at Madura in Original Petition No. 249 of 1913 (Execution Petition No. 179 of 1913, on the file of the Court of the Subordinate Judge of Ramnad, in Original Suit No. 467 of 1909, on the file of the High Court of Judicature at Fort William in Bengal).

Mr. *A. Krishnaswami Aiyar*, for the Appellant.

Mr. *A. Venkatarayaliah*, for the Respondent.

JUDGMENT.—The appellants obtained a decree for money against the respondent in the Calcutta High Court. As the respondent was residing within the jurisdiction of the Subordinate Judge's Court of Ramnad, the decree was transmitted on the 2nd September 1912 under the latter portion of Order XXI, rule 5, to the District Court of Ramnad for execution. This latter Court sent the decree to the Subordinate Judge. An application for execution was made to him on the 22nd of April 1913, and certain properties were attached. While the application was pending in the Sub-Court, the respondent moved the District Court to call up the records from the Sub-Court on the ground that under rule 161A of the Civil Rules of Practice, the proceedings taken in execution were void as they were instituted more than six months after the transmission of the decree by the Calcutta High Court

The District Judge upheld this contention and ordered "that the decree will be re-called from the Sub-Court and returned to the High Court of Calcutta." The present appeal has been presented against this order.

Mr. Krishnaswami Aiyar has argued a number of points against the view of the District Judge. He contended that there will be a further period of six months from the date of the District Court transferring the decree for execution to the Sub-Court. This is obviously untenable. He next contended that the District Judge had no power to re-call the decree from the Subordinate Judge. Section 24, clause (1) (*b*), is comprehensive enough to enable the District Court to withdraw a transmitted execution proceeding to its own file and to dispose of it. The learned Vakil has also argued that the exceeding of the time limit does not render the proceedings infructuous.

The aim of the rule is to compel the decree-holder to take prompt steps to enforce the decree. The rule is in the nature of an instruction or direction to the Court to return the papers to the transmitting Court, if no steps were taken by the decree-holder within six months to execute the decree. A violation of this rule does not render the proceedings taken void *ab initio*. In such cases, time is not of the essence of the stipulation. Mr. Justice Denman points out in *Caldow* v. *Pixell* (1): "The cases cited before us establish that, where a public officer is directed by a Statute to perform a duty within a specified time, the provisions as to time are only directory, and also that in considering whether a Statute is imperative a balance may be struck between the inconvenience of rigidly adhering to, and the inconvenience of sometimes departing from, its terms." Mr. Justice Lopes says that in deciding whether a rule is mandatory or directory, the possibility of justice suffering from a too rigid application of the time limit should be taken into account. In *Queen* v. *Ingall* (2), both Mellor and Lush, JJ., enunciate the same principle. Reference may also be made to *Brumfitt* v. *Bremner* (3) and to *Queen* v. *Lofthouse* (4). We think the reason underlying these pronouncements is applicable to the present case. The effect of holding that the Sub-Court was *functus officio* after six months and that the proceedings in execution are a nullity would, be to allow the judgment-debtor to escape the liability which the law subjects him to. The rule in question is not an adjunct to the Code of Civil Procedure. It is a rule of convenience issued by the High Court with the object of inducing decree-holders to take early steps to execute their decrees. Although section 148 of the Code of Civil Procedure may not apply in terms to the present case, its analogy may be utilised for the purpose of showing that the Legislature regards such provisions as directory in their nature and not mandatory.

We must reverse the order of the District Judge and direct him to return the records to the Sub-Court to enable the appellants to execute the decree under the process already issued.

Appellants are entitled to their costs in this Court.

Appeal allowed.

(1) 2 C. P. D. 562; 46 L. J. C. P. 541; 36 L. T. 469; 25 W. R. 773.

(2) 2 Q. B. D. 199; 46 L. J. M. C. 113; 35 L. T. 552; 25 W. R. 57.

(3) 9 C. B. (N. S.) 1; K. & G. 352; 30 L J. C. P. 33; 7 Jur. (N. S.) 371; 3 L. T. 375; 9 W. R. 144; 142 E. R. 1; 127 R. R. 582.

(4) 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 145; 12 Jur. (N. S.) 619; 14 L. T. 359; 14 W. R. 649.

CALCUTTA HIGH COURT.

REVIEW IN APPEAL FROM APPELLATE DECREE No. 2381 OF 1912.

March 10, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

KRISHNA BAR—DEFENDANT—APPELLANT—APPLICANT

versus

Srimati RANAMOYI DEBI—PLAINTIFF—RESPONDENT—OPPOSITE PARTY.

Mortgage suit, decree in, application for order absolute for sale of—Limitation Civil Procedure Code (Act V of 1908, O. XXXIV, r. 5.

An application for an order absolute for sale in a

mortgage-suit is a proceeding in execution and must be made within the time prescribed by the Limitation Act. [p. 122 col. 1.]

Batuk Nath v. *Munni Dei*, 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729 and *Abdul Majid* v. *Jowahir Lal*, 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; 36 A. 350 (P. C.), followed.

In the matter of an application for review of judgment passed by the Hon'ble Mr. Justice Fletcher and the Hon'ble Mr. Justice Richardson, on the 26th May 1914, in appeal from Appellate Decree No. 2381 of 1912, being an appeal preferred on the 13th of August 1912, against the decree of the Subordinate Judge, 1st Court, of Zillah Midnapore, dated the 7th May 1912, reversing that of the Munsif, 2nd Court, at Contai, dated the 21st August 1911.

FACTS of the case appear fully from the following judgment of Fletcher and Richardson, JJ., dated the 26th May 1914, under review:

FLETCHER, J.—The only point that calls for our decision in this appeal is whether an application for an order absolute for sale of a decree *nisi*, dated the 28th of September 1898, is barred by limitation.

The actual date of the application of the order absolute for sale does not appear from the paper-book, but it is admitted that the application was made after the Code of Civil Procedure, 1908, came into operation.

The Code of Civil Procedure, 1908, repealed sections 85 to 90 of the Transfer of Property Act, 1882, and in lieu thereof enacted the provisions contained in Order XXXIV in the first Schedule to the Code with reference to suits relating to mortgages on immoveable property.

Prior to the Code of 1908 it had been established by the decisions of this Court that there was no period of limitation within which a plaintiff was bound to apply for the order absolute for sale in a suit brought for sale of the mortgaged property. Thus in the case of *Tiluck Singh* v. *Parsotein Proshad* (1) Prinsep and Ghose, JJ., decided that an application under section 89 of the Transfer of Property Act, 1882, to have a mortgage decree for sale made absolute was not governed by Article 178 of the Indian Limitation Act, 1877, and that the Article was limited to applications under the Code of Civil Procedure. The learned Judges towards the close of their judgment made the following remarks: "We may further observe that no final order for sale having been passed, the suit may properly be regarded as being still pending." Article 181 of the Limitation Act of 1908 is in identically the same terms as Article 178 of the Act of 1877.

The question for our decision depends on whether the provisions of Order XXXIV of the first Schedule to the Code of Civil Procedure, 1908, apply so as to take away a vested, right which the plaintiff had, of applying to have the decree for sale made absolute.

The Allahabad High Court has laid down in the case of *Konsilla* v. *Ishri Singh* (2) that the effect of the Code of Civil Procedure, 1908, did not take away the vested right that a party had to apply to have his decree for sale made absolute.

A contrary view was taken by the Bombay High Court in the case of *Datto Atmaram Hasabins* v *Shankar Dattatraya* (3).

But with all respect to the learned Judges who decided that case, it seems to me that they founded their judgment on a misreading of the judgment of Jenkins, C. J., in the case of *Amolak Chand Parak* v. *Sharat Chundra Mukerjee* (4).

Moreover, we have the recent decision of a special Bench of this Court in the case of *Gopeshwar Pal* v. *Jiban Chandra* (5), which laid down that a right of suit is a vested right and that it is an established axiom of construction that though procedure may be regulated by the Act for the time being in force still the intention to take away a vested right without compensation or any saving is not to be imputed to the Legislature unless it be expressed in unequivocal terms.

Applying those principles to the case before us I think the learned Judge in the lower Appellate Court came to a correct decision.

The present appeal, therefore, fails and ought to be dismissed with costs.

RICHARDSON, J.—I agree.

Babu *Jyotish Chandra Hazra*, for the Applicant.

(1) 22 C. 924.

(2) 6 Ind. Cas. 188; 7 A. L. J. 420; 32 A. 499.

(3) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.

(4) 11 Ind. Cas. 943; 38 C. 913; 16 C. W. N. 49.

(5) 24 Ind. Cas. 37; 18 C W. N. 804; 19 C. L. J. 549; 41 C. 1125.

SHASHI BHUSAN HAZRAH *v.* ESABAR ALI.

Babu *Brojo Lal Chakravarti*, for the Opposite Party.

JUDGMENT.

FLETCHER, J.—This is a Rule obtained by the defendant-appellant calling on the plaintiff-respondent to show cause why a review of judgment shculd not be granted. The only question involved in the appeal was. whether an application for an order absolute for sale of a decree in a mortgage suit, dated the 28th of September 1898, was barred by limitation. Following the decisions of this Court on appeals from Courts subordinate thereto we held, as we were bound to hold, that no period of limitation applied to such an application and that the Code of Civil Procedure, 1908, had not taken any vested right that the plaintiff had. On the original side of the Court a different view has been taken, namely, that an application for an order absolute for sale in a mortgage suit is a proceeding in execution and must be made within the time prescribed by the Indian Limitation Act: *Amolak Chand Parak* v. *Sharat Chunder Mukerjee* (4). After our decision in the present case the learned Vakil for the defendant appeared and called our attention to two decisions of the Privy Council published since the date of our judgment. These two decisions are *Batuk Nath* v. *Munni Dei* (6) and *Abdul Majid* v. *Jawahir Lal* (7). In both of these cases the Privy Council had expressed an opinion contrary to the view we expressed in our judgment. We, therefore, issued the present Rule.

I think the present Rule must be made absolute. The present case is covered by the two decisions of the Privy Council that I have cited above. Moreover the case of *Munna Lal Parrack* v. *Sarat Chander Mukerji* (8) has been on appeal to the Privy Council and the decision of this Court has been affirmed. See *Raja Narendra Lal Khan* v. *Jogi Hari* (9). That being so, the preset Rule must be made absolute. The appeal of the defendant must be allowed and the judgment of the Subordinate Judge set aside and that of the Munsif restored. The plaintiff must pay to the defendant his costs in this Court and the Courts below including the costs of this Rule, the hearing fee in the Rule being one gold *mohur*.

RICHARDSON, J.—I agree.

Rule made absolute.

(6) 23 Ind. Cas. 644; 36 A. 284; 18 C. W. N. 740; 12 A. L. J. 596; 19 C. L. J. 574; 16 Bom. L. R. 360; 27 M. L. J. 1; 16 M. L. T. 1; 1 L. W. 729.

(7) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17 (1914 M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483.

(8) 27 Ind. Cas 683; 17 M. L. T. 120; 21 C. L. J. 118; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408.

(9) 2 C. L. J. 107; 32 C. 1107.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2310, 2651 TO 2657 OF 1911 AND APPEAL FROM ORDER NO. 646 OF 1911.

March 11, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

SHASHI BHUSAN HAZRAH--DEFENDANT—APPELLANT (IN ALL CASES)

versus

IN NO. 2310 OF 1911

Sheikh ESABAR (ESRAR) ALI NAZIR AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2651 OF 1911

PURNA CHANDRA PAL—PLAINTIFF—RESPONDENT

IN NO. 2652 OF 1911

KALIDAS SAMANTA AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2653 of 1911

JOGENDRA NATH SAMANTA AND ANOTHER—PLAINTIFFS—RESPONDENTS

IN NO. 2654 OF 1911

Sheikh ARIETULLAH AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2655 OF 1911

AKHIL CHANDRA ADHICARY AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2656 OF 1911

KALIDAS SAMANTA AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 2657 OF 1911

ABDUL GAFFUR NAZIR AND OTHERS—PLAINTIFFS—RESPONDENTS

IN NO. 646 OF 1911

Sheikh ARIETULLA AND OTHERS—PLAINTIFFS—RESPONDENTS

Bengal Tenancy Act (VIII of 1885), ss. 109, 106, scope of—Revenue Court's duty as to fair rent—Suits in Civil Court, bar of—Revenue and Civil Courts, jurisdiction of—No forfeiture for mistake in selecting one Court for another.

Under the provisions of section 109 of the Bengal Tenancy Act, the decision of a Settlement Officer or rather a Revenue Court, with reference to what is the fair and equitable rent, is binding and conclusive and the tenants are not entitled to question that decision in any Civil Court, provided that the question in the Civil Court is concerning any matter which is or has clearly been the subject of an

application made under sections 105 to 108 of the Bengal Tenancy Act [p. 123, col. 1.]

The duty of a Revenue Court is limited to the inquiry as to what is the fair rent, having regard to the entry that appears on the Record of Rights and, therefore, section 109 of the Bengal Tenancy Act is no bar to a suit by a tenant for a declaration that the lands are either *lakheraj* or are held at fixed rates. Section 106 of the Bengal Tenancy Act does not exclude the right of a Civil Court. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special Tribunal, that necessarily excludes the jurisdiction of the ordinary Courts of the country. [p. 124, col. 1.]

A person, because he went to a Civil Court instead of going to a Revenue Court, is not liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. [p. 124, col. 2.]

IN No. 2310, 2651 TO 2657 OF 1911.

Appeals against the decrees of the Sub-Judge, first Court, Hooghly, dated 7th July 1911, affirming the decrees of the Munsif, second Court, Uluberiah, dated 31st August 1910.

IN No. 646 OF 1911.

Appeals against the orders of the Subordinate Judge, first Court of Hooghly, dated the 7th of July 1911, reversing that of the Munsif, second Court, at Uluberiah, dated the 31st of August 1910, and remanding the case to his Court for trial on its merits.

Dr. *Rash Behari Ghose*, Babus *Sarat Chandra Roy Chowdhury*, *Jyotish Chandra Hazra* and *Satya Charan Sinha*, for the Appellant.

Babus *Mohendra Nath Roy*, *Nagendra Nath Ghosh* and *Haradhan Chatterjee*, for the Respondents in Nos. 2310, 2652, 2654, 2657 and 646.

JUDGMENT.

FLETCHER, J.—These appeals are preferred by the defendant, who is the *darpatnidar* of a certain *mouzah*, called Nagarpore, of which his father obtained a *darpatni* settlement on the 13th April 1899. The plaintiffs in these cases are the various tenants in the *mouzah*. The rights that the plaintiffs allege they have in the lands are either that their lands are *lakheraj*, or, in two cases, I think, that they are held at fixed rents. The only objection that has been raised before us is as to whether the Civil Court had jurisdiction to hear and determine these suits. Proceedings were commenced on the 27th July 1901 by the father of the defendant to have a Record of Rights prepared and that being done, the record was finally published on the 9th July 1903, and the lands of the plaintiffs in those suits were all recorded as *mal* lands. The defendant's father then applied under section 105 of the Bengal Tenancy Act for assessment of fair and equitable rents of the lands. Objections were raised by the tenants, namely, that certain of the lands were *lakheraj* and the rest of the lands were held at fixed rents. The Settlement Officer held that certain of the lands were *lakheraj*, but that the other lands were not held at fixed rents, but were liable to have fair rents assessed. The cases were then taken before the Special Judge and the learned Special Judge agreed with the decision of the Settlement Officer. Then second appeals were preferred to this Court, and this Court was of opinion that the decision of the Settlement Officer was *ultra vires* in holding that the lands were *lakheraj* and that the duty of the Settlement Officer was to settle rents having regard to the entries that appeared in the Records of Rights. This Court upheld the decision in so far as it held that the other lands were not held at fixed rents. Then the cases went back to the Settlement Officer and he settled, in accordance with the decision of this Court, fair rents under the provisions of the Bengal Tenancy Act. The tenants then went to the Civil Court and they brought, amongst other suits, the suits that are now under appeal in which they asked for a declaration either that the lands were *lakheraj* or that they were held at fixed rents. It is now argued that the decisions of the Courts below are wrong, on the ground that the decision of the Settlement Officer or rather the Revenue Court with reference to what is the fair and equitable rent is binding and conclusive and that the tenants are not entitled to question that decision in any Civil Court. Of course, that is so under the provisions of section 109 of the Bengal Tenancy Act, provided that the question in the Civil Court is concerning any matter which is or has clearly been the subject of an application made under sections 105 to 108 of the Bengal Tenancy Act. But it is obvious from the decision of this Court in the second appeals, to which I have referred, that this Court held that the Revenue Officer was not competent to go behind the Record of Rights and enquire what was the real

nature of the interest of the tenants. This Court said that the duty of the Revenue Court was limited to the inquiry as to what was the fair rent having regard to the entry that appeared on the Record-of-Rights. It is quite obvious that, in that view, section 109 of the Bengal Tenancy Act would not be a bar to the present suits.

Then an argument that seems to me to have no substance at all has been advanced and that is that, having regard to the terms of section 106 of the Bengal Tenancy Act, as the tenants have taken no proceedings as contemplated by that section, therefore, they are deprived of the right of suit in the Civil Court. But the wording of the section clearly does not bear any such construction. The words are that "a suit may be instituted." The word "may" cannot be construed as meaning that the jurisdiction of the Civil Court is excluded. Before the jurisdiction of the ordinary Courts of the country can be excluded by a special Court, namely, the Revenue Court, there must be the clear words in the Statute excluding such jurisdiction. It is quite true that Dr. Ghose has referred to us an unreported decision of this Court* in which the view is taken that section 106 does exclude the jurisdiction of the ordinary Civil Court. But that decision stands alone or rather if it has got any support at all, it is supported by the decision in *Jogendra Nath* v. *Krishna Pramada* (1), that has received judicial consideration on more than one occasion and cannot be considered as lending a strong support. It is sufficient to say that my learned brother who is sitting with me has, in a well-considered judgment,† already dissented from this decision which Dr. Ghose relies upon. I do not see how, on the plain words of the section (106), it can be said that the section excludes the right of the Civil Courts. It is an extremely dangerous proposition to say that whenever a Statute gives a person a right to go, if he thinks fit, to a special tribunal, that necessarily excludes the jurisdiction of the ordinary Court of the country. I think that it does not so exclude and that the words of section 06 are merely permissive, and in my opinion the decisions in the two cases* that have been cited to us by the learned Vakil for the respondents are more in accordance with not only principle, but the plain words of section 106, than that which Dr. Ghose has relied upon. That being so, it is manifest that there is nothing in the proceedings that have taken place before the Revenue Court or the omission of the plaintiffs in these suits to resort to the Revenue Court that would take away the rights that the plaintiffs allege they have in the lands as against the *darpatnidar*. It seems to me to be an alarming proposition to put forward that a person, because he went to the Civil Court instead of going to the Revenue Court, is liable to be deprived of his rights to the property which he may have purchased or inherited from his ancestors. I agree with the decision of my learned brother in the case that has been handed over to us by the learned Vakil for the respondents and I think that the judgment arrived at by the learned Judge of the lower Appellate Court is correct. The appeals, therefore, fail and must be dismissed with costs.

TEUNON, J.—I agree.

Appeal dismissed.

(1) 35 C. 1013; 12 C. W. N. 1032; 8 C. L. J. 322.

*Reported in Indian Cases. See *Sashi Bhusan Hazra* v. *Aswini Comar Samanta*, 28 Ind. Cas. 981; 19 C. W. N. 637*n*.—*Ed.*

†Reference appears to be to *Shashi Bhushan Hazra* v. *Denamoyee Dasi*, 23 Ind. Cas. 615; 19 C. W. N. 638*n*—*Ed.*

*Reference apparently is to *Pandab Dowari Das* v. *Ananda Kishun Chakravarti*, 7 Ind. Cas. 102; 12 C. L. J. 195; 14 C. W. N. 897 and *Shashi Bhushan Hazra* v. *Denamoyee Dasi*, 23 Ind. Cas. 615; 19 C. W. N. 638*n*.—*Ed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1093 OF 1913.

January 12, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Napier.

ARUNAGIRI MUDALIAR—PLAINTIFF—APPELLANT

versus

KUPPUSAMI PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 82, 101—Usufructuary and simple mortgage in favour of same person—Mortgagee purchasing some of mortgaged property—Suit on simple mortgage—Liability of property purchased to rateable contribution.

The defendant No. 1 and another mortgaged certain properties to the plaintiff with possession. Later on

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defendants Nos. 1 and 2 executed a simple mortgage in respect of the same lands as well as a house and a house site in favour of the plaintiff. The plaintiff then purchased the lands, the sale-deed expressly stating that the debt secured by the simple mortgage should stand In a suit to enforce the mortgage security under the second mortgage:

Held, (1) that the plaintiff took the lands subject to all the incidental liabilities which attached to them by reason of their having been previously mortgaged under the simple mortgage and which were, therefore, liable to contribute to the debt secured by it; [p. 126, col. 2.]

(2) that the plaintiff's liability to contribute out of the value of the lands purchased by him arose not by reason of his position of usufructuary mortgagee but by his purchase of the mortgagors' equity of redemption. [p. 126, col. 2.]

Held, (per *Napier, J.*, dissenting), that the plaintiff mortgagee was entitled to enforce his claim for the whole amount of his mortgage against the property. [p. 128, col. 1.]

Sesha Aiyangar v. *Krishna Aiyangar*, 24 M. 96; 12 M. L. J. 383; *Mir Esuff Ali Haji* v. *Panchanan Chetterjee*, 6 Ind. Cas. 842; 15 C. W. N. 800; 11 C. L. J. 639, followed.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 496 of 1912, preferred against the decree of the Court of the District Munsif of Tiruvannamalai in Original Suit No. 103 of 1912.

FACTS of the case appear from the following judgment of the District Judge:—

"Plaintiff appeals. Defendants Nos. 1 and 2 are brothers. On 1st October 1895, 1st defendant and another mortgaged certain lands measuring 7 acres 98 cents to plaintiff with possession under Exhibit E for Rs. 500.

On the 3rd February 1900, defendants Nos. 1 and 2 executed a simple mortgage, Exhibit A, for Rs. 100 in respect of the same lands as well as a house and vacant sites in favour of plaintiff. In order to discharge the mortgage-debt of Exhibit E and other debts, (documents Nos. 1 and 2) the two persons sold the lands for Rs. 950 to plaintiff on 9th May 1901, under a sale-deed Exhibit F.

On 22nd December 1908, 5th defendant purchased the house and vacant sites from 1st defendant for Rs. 500, under Exhibit 1. Plaintiff now sues to enforce the mortgage security, Exhibit A, and to recover Rs. 460 from the defendants by the sale of the mortgaged property.

Defendant No. 5's contention was that all the properties comprised in the mortgage, Exhibit A, were liable for the satisfaction of the plaint debt and that not more than a rateable part of the mortgage-debt should be thrown upon the property in his hands, *viz.*, the house and vacant sites. The District Munsif accepted the contention that plaintiff was only entitled to recover Rs. 306-10-8, in the proportion which the value of the house and sites (Rs. 600) bore to the value of the lands (Rs. 400) free of the mortgage of 1900. Exhibit F is styled * * * * * * * to be an outright deed of sale. It, however, contains the following recital: * * * * * * * *

which is translated correctly by the Munsif, as "while the mortgage of 3rd February 1900 (*i. e.* Exhibit A) created by Kuppusami Pillai and Narayanasami Pillai (defendants Nos. 1 and 2) is still subsisting, we sell these lands to you."

I agree with the District Munsif that what was sold was the equity of redemption and that the document cannot be construed as a sale of the vendor's entire interest free of the mortgage charge.

Section 82 of the Transfer of Property Act provides that between several properties mortgaged to secure one debt rateable contribution to that debt is to prevail in the absence of a contract to the contrary. The circumstance that the mortgagee plaintiff subsequently purchased a portion of the mortgaged property does not, I think, affect the doctrine of contribution. The rateable burden which the properties are to bear has to be calculated according to their valuation at the time of the mortgage.

I think the District Munsif was right in holding that plaintiff was bound to abate a portion of his debt in the proportion which the value of the properties purchased by him bore to the whole mortgaged property.

The only other question argued in this appeal is whether the decision in a former suit, Original Suit No. 236 of 1907, in the Tirukavilur District Munsif's Court operates as *res judicata*. It appears that 5th defendant sued defendants Nos. 1 and 2 to enforce a mortgage of 1904. The present plaintiff, who

was 5th defendant in the suit, pleaded that the house which was item No. 1 in the suit should be sold subject to his prior mortgage of 1900. Fifth defendant admitted plaintiff's priority and a decree was passed accordingly. Plaintiff did not allege in his written statement that he had a mortgage on the house and lands also. There was no decision in the former suit on the question in issue in this suit, and it is difficult to see how 5th defendant can be estopped from raising his present plea that the property sold to him is only liable to contribute rateably to the plaint mortgage debt.

The matter is clearly not *res judicata* by reason of the decision in the former suit.

The appeal fails and is dismissed with costs."

Mr. *C. Padmanabha Aiyangar*, for the Appellant.

Mr. *K. R. Rangaswami Aiyangar*, for the Respondents.

JUDGMENT.

SPENCER, J.—It is clear in my opinion that when the plaintiff purchased the cultivable lands by his sale-deed, Exhibit F, on 9th May 1901, he took them subject to all the incidental liabilities which attached to them by reason of their having been previously mortgaged under the simple mortgage (Exhibit A) of 3rd February 1900 along with the house and house site of defendants No. 1 and 2. In fact the sale-deed expressly stated that the debt secured by the simple mortgage was to stand, thus bringing the case within the first exception to section 101 of the Transfer of Property Act. I am unable to read into these words an implied meaning that they referred to the simple mortgage standing not on the lands described in the sale deed, but on other property not therein specified. If the parties intended to convey a different meaning by the words used by them, then I can only say that they did not express their meaning properly. There are no words in the document stating expressly or by implication that the sale was free of encumbrances. In other words, the plaintiff took whatever rights over the cultivable lands the mortgagors had to sell, *viz.*, the equity of redemption, while the mortgagors retained all the rights they hitherto possessed in the house and house site. Again, when on 22nd December 1908, the 5th defendant purchased from defendants Nos. 1 and 2 the house and house site, he succeeded to all the rights and benefits which the mortgagors then possessed in that property. Among such rights was the right conferred by section 82 of the Transfer of Property Act of making the lands mortgaged along with the house and site contribute rateably to the debt secured by the simple mortgage of 3rd February 1900.

It is argued, *first*, that by providing in the sale-deed (Exhibit F) for the discharge of the principal of his own usufructuary mortgage of 1st October 1896, the plaintiff impliedly cast all the burden to which the property was then subject on the house and site: and *secondly*, that the 5th defendant's undertaking to discharge plaintiff's simple mortgage when he took a private conveyance of the house and site was equivalent to a renunciation of his right to make the other lands bear any portion of the debt.

But the usufructuary mortgage does not really affect the question, as it had been cleared off before the 5th defendant purchased the house and site and thus plaintiff's liability to contribute out of the value of the lands purchased by him to the discharge of his own simple mortgage arose, not by reason of his position as usufructuary mortgagee of the lands but by his purchase of the mortgagors' equity of redemption.

Again, the 5th defendant's agreement (Exhibit G) was an agreement with one of the mortgagors (1st defendant) and could not be taken as the foundation of any rights in favour of any other owners of property burdened by the plaintiff's simple mortgage, such for instance as the plaintiff.

Lastly, as regards the plea of *res judicata*, the admission of 5th defendant, who was plaintiff in Original Suit No. 236 of 1907, was an admission of priority, not an admission that he surrendered his right to claim contribution at any future date, nor was the right to contribution directly and substantially in issue in that suit. I hold that the view taken by the lower Courts was correct and that this second appeal must be dismissed with costs.

NAPIER, J.—This is an appeal from a judgment of the District Judge of North Arcot in Appeal Suit No. 496 of 1912, from

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Original Suit No. 103 of 1912 on the file of the District Munsif of Tiruvannamalai. The suit asked for a mortgage decree in respect of an amount of Rs. 460, alleged to be due from the defendants on a simple mortgage deed, Exhibit A, executed by defendants Nos. 1 and 2 on 3rd February 1900. The properties covered by this mortgage were certain lands which had already been mortgaged by the 1st defendant and another to the plaintiff by Exhibit E on the 1st October 1896, together with a house and house site charged for the first time by Exhibit A. The plaintiff, by Exhibit F of the 9th May 1901, purchased the lands covered by Exhibit E, and the present suit is to recover the whole amount due on the mortgage Exhibit A by the sale of the house and house site charged therein. The District Munsif held that the plaintiff must abate a portion of his claim in the proportion which the value of the properties purchased by him bears to the whole properties mortgaged, and gave a decree with respect to two-thirds of the claim only.

The District Judge, on appeal, holds that under the purchase-deed, Exhibit F, the mortgagors sold to the mortgagee the equity of redemption and that the document could not be construed as a sale of the mortgagors' entire interest free of the mortgage charge. He, therefore, held that, just as a stranger would be bound to contribute under section 82, so the mortgagee in his capacity of owner of the equity of redemption of one of the properties must contribute also, and, that on making allowance for what he was bound to contribute, the District Munsif was right in only allowing the sale for two-thirds of the value of the mortgaged property.

The point argued before us on appeal is that Exhibit F is not a sale of the equity of redemption keeping the mortgage alive, but a sale of the whole property free of the mortgage charge. Reliance is placed by the appellant on the case of *Mir Esuff Ali Haji* v. *Panchanan Chatterjee* (1), where the distinction between these two classes of transactions is pointed out, and the test laid down by Mr. Justice Mookerjee is "whether the mortgagee purchaser applied the purchase-money towards the satisfaction of the mortgage debt," and he then expressed the view that it was not fair, if he had done that, to make him give credit, when proceeding against the other property, for a further sum representing the difference between the mortgage value and the settled price. The appellant appears to have sought in the first Court to adduce oral evidence as to the intention of the parties at the time of Exhibit F, obviously for the purpose of explaining the apportionment of the purchase-money. But the District Munsif refused to admit it, holding that the language of Exhibt F was clear that the mortgage was kept alive. In his appeal memorandum to the lower Appellate Court he pressed that this evidence should not have been shut out, and renews this plea here and desires to show how the purchase-money of Rs. 950 was applied. Exhibit F purports to be a deed of absolute sale of the property with full right to alienate by sale, gift, etc. Then come the words on which the difficulty arises: "The amount due under the hypothecation deed executed on 3rd February 1900 is excluded." This translation, as well as the translation by the lower Courts, is challenged by the appellants; and an alternative reading is given to us by the Bench clerk, "while the balance due under the hypothecation deed executed on 3rd February 1900 stands." The appellant argues that this means that the amount remains as a charge on the other property, *i.e.*, the house and house site, and that it was put in to make that clear. The respondent supports the view taken by the lower Court that it was intended to keep alive the liability on this property also.

In these circumstances I think it best to see what the nature of the original mortgage was. Exhibit A was a simple mortgage, that is to say, a promise by the mortgagor to pay the mortgage-money with a right to proceed against the hypothecated properties for the purpose of recovering the amount. Exhibit E, the prior mortgage, was a usufructuary mortgage. When the property was sold by Exhibit F the title to the property passed to the mortgagee who already had the right to possession. What, then, became of

(1) 6 Ind. Cas. 842; 11 C. L. J. 639; 15 C. W. N. 800.

the mortgagee's rights under Exhibit A with reference to this property? I am unable to see how Exhibit F can have failed to operate as a merger. His right under Exhibit A was to bring the property to sale. When the property had passed into his hands as absolute owner, this right must, apart from any statutory possession, necessarily disappear. It is quite true that under section 101 of the Transfer of Property Act it is in the power of the mortgagee to keep the charge alive, but I am unable to see any express words or necessary implication in the language quoted above by which the mortgagee declares that it shall continue to subsist. The alternative requirement is that the continuance would be for his benefit. It is most obvious that if there is another property liable for the mortgage amount which is sufficient to discharge it, it cannot be for the benefit of the mortgagee to keep alive the charge on the property purchased so as to render him liable to make a rateable reduction. I am inclined to think that the appellant's reading of the clause is the correct one. Anyhow, I am clear that it has not been made out that the view taken by the lower Court is correct.

I would refer to the view that I have expressed in *Thuvoor Venkatasubba Reddy* v. *Bagiammal* (2) that a mortgagee is entitled, subject to the provisions of sections 56, 60 and 81, to proceed, for the whole amount of his mortgage debt, against any portion of the mortgaged property, and I decline to introduce limitations to this right save as are to be found in the language of the Act, or as arise by fraud of the mortgagee or in circumstances coming within the purview of section 90 of the Trust Act, which must be alleged and made out as an answer to the plaintiff mortgagee's claim.

In my view it does not rest on the plaintiff to show that he paid the full value of the unincumbered property to the defendants No. 1 and 2, but on the defendants to establish the contrary. The property was, as above stated, subject to a usufructuary mortgage in favour of the plaintiff on which Rs. 500 was due and the purchase-money was Rs. 950. Defendants Nos. 1 and 2 did not set up any case of fraud or allege that the sum of Rs. 950 was not the full value for the property. The 5th defendant is the real contesting defendant. He purchased the equity of redemption in the house property covered by Exhibit A long after the sale under Exhibit F, his purchase being in 1908, while Exhibit F is in 1901. In his written statement he claims the rateable reduction, but alleges no grounds in support of the claim. In my opinion this case is covered by the principles laid down in *Sesha Aiyangar* v. *Krishna Aiyangar* (3) and *Mir Esuf Ali Haji* v. *Pachanan Chatterjee* (1), and the plaintiff mortgagee is entitled to enforce his claim for the whole amount of his mortgage against the property covered by Exhibit A, and I would give a preliminary decree for sale for the whole amount found due on the mortgage; but as my learned brother takes a different view, the appeal will be dismissed with costs.

Appeal dismissed.

(2) 29 Ind. Cas. 113; 2 L. W. 469; (1915) M. W. N. 339; 17 M. L. T. 411.

(3) 24 M. 96; 12 M. L. J. 283.

CALCUTTA HIGH COURT.

APPEAL FROM ORDERS NOS. 181 AND 189 OF 1913

June 4, 1914.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

IN NO. 181 OF 1913

NRIPENDRO NATH SHAHOO—APPELLANT

IN NO. 189 OF 1913

GOPINATH MANDAL—APPELLANT

versus

ASHUTOSH GHOSH AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 37 (1), scope of—Transfer of property or any interest therein—Preference, fraudulent—Burden of proof—Dominant view—Proper test—Disposition, voluntary—Debtor's state of mind—Good faith no protection to creditor.

Before a transfer by a debtor of any interest in his property is avoided under section 37 (1) of the Provincial Insolvency Act, four conditions must be fulfilled, namely *first*, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; *secondly*, the transaction must be in favour of a creditor or of some person in trust for a creditor: *thirdly*, the debtor must have acted with the view of giving such creditor a preference over his other creditors; and *fourthly*, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. [p. 130, col. 1.]

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Where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so. [p. 130, col. 1.]

In re Laurie, Ex parte Green, (1898) 5 Manson 148; 67 L. J. Q. B. 431; 46 W. R. 491, *In re Eaton and Co., Ex parte Viney*, (1897) 2 Q. B. 16; 66 L. J. Q. B. 491; 4 Manson 111 and *In re Lake, Ex parte Dyer*, (1901) 1 K. B. 710; 70 L. J. K. B. 390; 84 L. T. 430; 49 W. R. 291; 8 Manson, 145, referred to.

In the determination of the question whether a person is able or unable to pay his debts, as they become due, from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts, is immaterial. [p. 130, col. 2.]

Washington Diamond Co. In re, (1893) 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27; 41 W. R. 681, referred to.

A particular transaction in favour of a creditor may be set aside as a fraudulent preference only if it is proved that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors. [p. 130, col. 2; p. 131, col. 1.]

Ex parte Griffith, Wilcoxon, In re, (1883) 23 Ch. D. 69; 52 L. J. Ch. 717; 48 L.T. 450; 31 W.R. 878 and *Ex parte Hill, Bird, In re*, (1883) 52 L. J. Ch. 903; 49 L. T. 278; 32 W. R. 177; 23 Ch. D. 695 at p. 704, referred to.

The proper test to ascertain the dominant view is the question, "was the act done voluntarily"? [p. 131, col. 1.]

A voluntary disposition is an act moving from the debtor spontaneously. [p. 131, col. 1.]

The use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure. [p. 131, col. 2.]

In every case the state of mind of the debtor is the paramount consideration. [p. 132, col. 1.]

Under section 37 of the Provincial Insolvency Act (which is substantially identical with section 48 of 46 & 47 Vict. c. 52), good faith on the part of the creditor affords him no protection where the intention of the debtor to give him a preference is established, although sub-section (2) of section 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent. [p. 132, col. 1.]

Davison v. *Robinson*, (1857) 3 Jur. (N.S.) 791; *Butcher* v. *Stead*, (1875) 44 L. J. Bk. 129; 33 L. T. 548; (1857) 24 W. R. 463; 7 H. L. 839; and *Sharp* v. *Jackson*, A. C. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Manson, 264; 15 T. L. R. 418, referred to.

Appeals against the orders of the Additional District Judge, 24-Perganas, dated the 30th January 1913.

IN APPEAL NO. 181 OF 1913.

Mr. *B. Chakravarti*, Counsel, and Babus *Ram Chandra Majumdar* and *Jnanendro Nath Sircar*, for the Appellant.

IN APPEAL NO. 189 OF 1913.

Babus *Mohendra Nath Roy* and *Panchanan Gohse* for Babu *Khetter Mohan Sen*, for the Appellant.

IN APPEALS NOS. 181 AND 189 OF 1913.

Babus *Bepin Behari Ghose* and *Satish Chandra Mukerjee*, for the Respondents.

JUDGMENT.

MUKERJEE, J.—These appeals are directed against an order under section 37 of the Provincial Insolvency Act. On the 4th December 1911, Nilratan Mandal and his four brothers executed a mortgage for Rs. 9,000 in favour of one of their unsecured creditors, Nripendra Nath Sahu. On the 27th December 1911 and 14th February 1912, they executed two other mortgages, one for Rs. 6,000 and another for Rs. 10,000, in favour of their unsecured creditor Gopinath Mandal. On the 19th February 1912, a third creditor, Kissen Chand Kessari Chand, applied to the District Judge under section 5 of the Provincial Insolvency Act so that the mortgagors might be adjudicated insolvents. The application was granted and a local Pleader, Babu Ashutosh Ghose, was appointed Receiver. In due course on the 26th September 1912, the Receiver applied to the Court to take action under section 37 and to annul the three mortgages mentioned. This application was granted on the 30th January 1913, and the present appeals, which have been preferred by the two mortgagees separately, are directed against that order. The District Judge has found that when Nilratan Mandal executed and registered the deeds, he knew that he was not in a position to pay his debts, and that, consequently, the mortgages must be declared fraudulent and void as against the Receiver. This decision of the District Judge has been assailed before us, on the ground that all the elements necessary to justify an order for avoidance of the mortgages under section 37 have not been established, and that the requirements of that section have not been fully appreciated. In our opinion, this contention is well-founded and the case must be re-tried.

Sub-section (1) of section 37 of the Provincial Insolvency Act—we quote so much only of the sub-section as applies to the present case—provides as follows: "Every transfer of property or of any interest therein.....by any person unable to pay his debts, as they become due, from his own

money, in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Receiver and shall be annulled by the Court." It is plain that before a transfer by a debtor of any interest in his property is avoided under this section, four conditions must be fulfilled, namely, *first*, the debtor must, at the date of the transaction, be unable to pay from his own money his debts as they fall due; *secondly*, the transaction must be in favour of a creditor or of some person in trust for a creditor; *thirdly*, the debtor must have acted with the view of giving such creditor a preference over his other creditors; and *fourthly*, the debtor must be adjudged an insolvent on an insolvency petition presented within three months after the date of the transaction sought to be impeached. There is no dispute that the second and fourth elements are present in the case before us. The mortgagees were creditors of the mortgagors on the dates when the mortgage instruments were executed; the promissory notes on which they had previously advanced moneys to the Mandals were unpaid on those dates: these have been produced and proved to represent genuine transactions. There is also no question that the insolvency petition was presented by the creditor on the 19th February 1912, that is, within three months after the earliest of the three mortgages impeached. The controversay has thus centered round the first and third conditions. Before we discuss the requirements of these two conditions, we may point out, however, that where an act is impeached as a fraudulent preference, the onus of proof lies on the Receiver [*Ex parte Lancaster, In re Marsden* (1)], and it has been said [*In re Laurie, Ex parte Green* (2)] that the burden of proof lies on the Receiver, even if the debtor was insolvent at the time of the payment and knew himself to be so, though the view has been indicated that in such a case the onus might shift: *In re Eaton and Company, Ex parte Viney* (3), *In re Lake, Ex parte, Dyer* (4).

The *first* point for consideration is, whether the mortgagors were, on the dates of the mortgage transactions, able to pay from their own money their debts as they fell due. The evidence on the record does not enable us to pronounce an opinion upon this matter. There were, it must be remembered, three mortgages of the 4th December 1911, 27th November 1911 and 14th February 1912. Each of these transactions has to be tested from the point of view of the condition mentioned, and it is quite conceivable that the mortgagors, though not able to pay from their own money their debts as they fell due on the 14th February 1912, might have been in a very different position more than two months earlier, on the date of the first of the three mortgages. Two factors must plainly be taken into account on the date of each transaction, namely, what were the debts payable by the mortgagors on that date, and, what was the money then available to them to pay such debts? In this connection, it may be pointed out that in the determination of the question whether a person is able or unable to pay his debts as they become due from his own money, the fact that he has money locked up which, at a later period, may be available for the payment of his debts is immaterial: *Washington Diamond Co., In re* (5). The question, therefore, whether the debtors were, at the date of each of the three mortgages impeached, unable to pay, from their own money, their debts as they fell due, must be investigated.

The *second* point for consideration is whether the debtors acted with the view of giving the mortgagees a preference over their other creditors. Here again, the case of each mortgagee and of each transaction with him has to be separately considered in the light of the surrounding circumstances on the several dates. A particular transaction may be set aside as a fraudulent preference, only if it is proved that it was carried out with the substantial or dominant

(1) (1883)25 Ch. D. 311 at p. 319; 53 L. J. Ch. 1123; 50 L. T. 223; 35 W. R. 483.

(2) (1898) 5 Manson, 48; 67 L. J. Q. B. 431; 46 W. R. 491.

(3) (1897) 2 Q. B. 16; 66 L. J. Q. B. 491; 4 Manson, 111.

(4) (1901) 1 K. B. 710; 70 L. J. K. B. 390; 84 L. T. 430; 49 W. R. 291; 8 Manson, 145; 17 T. L. R. 296.

(5) (1893) 3 Ch. 95; 62 L. J. Ch. 895; 69 L. T. 27; 41 W. R. 681.

view of giving the creditor a preference over the other creditors: *Ex parte Griffith, Wilcoxon, In re* (6), *Ex parte Hill, Bird, In re* (7). This need not be the primary result aimed at; it is sufficient that it should be the object aimed at in bringing about the primary result: *Ex parte Taylor, Goldsmid, In re* (8), *New's Trustee* v. *Hunting*(9). If the transaction can properly be referred to some other motive than that of giving the particular creditor a preference over the other creditors, the payment is not fraudulent, because the invalidity of the transaction arises from the intention on the part of the debtor to act in fraud of the Bankruptcy Law, that is, to prevent the distribution of his property rateably among all his creditors [*Bills* v. *Smith* (10)]. To ascertain whether the giving of a preference to the particular creditor, that is, putting that creditor in a better position relatively to the other creditors than that in which he would be placed by the Bankruptcy Law [*Bourne* v. *Graham* (11)] was the dominant view in the debtor's minds, "the proper test to be applied is, was the act done voluntarily, a question the solution of which depends primarily on the inquiry, from which party did the proposition originate: *In re Eaton & Co., Ex parte Viney* (3), *In re Vautin; Saffery, Ex parte* (12). A voluntary disposition is an act moving from the debtor; the question, consequently, in most cases, if not always, is—did the thing move from the debtor or from the creditor? *Ex parte Deetastet* (13), *Strachan* v. *Barton* (14). If it moves entirely from the debtor, in the sense that it was his spontaneous act uninfluenced by any circumstances which tend to rebut the presumption that the bankrupt made a distinction among his creditors, then the transaction will be condemned as a fraudulent preference: *Ex parte Tempest, Craven, In re* (15), *Bills* v. *Smith* (10). If on the other hand, the proposal for the payment or the disposition of the property comes entirely from the creditor and is not collusive, the transaction will stand: *Crosby* v. *Crouch* (16), *Ex parte Hall, Cooper, In re* (17). To take one illustration if it is established that the transaction was the result of real pressure brought to bear on the debtor by a creditor, it cannot be deemed his spontaneous act: *Tomkins* v. *Saffery* (18), *Butcher* v. *Stead* (19), *Sharp* v. *Jackson* (20), *Joakim* v. *Secretary of State* (21) for, as Lord Cairns said in *Butcher* v. *Stead* (19), the use of the word "preference" implies an act of free will, so that there can be no preference where the act is the result of pressure. The pressure, as we have said, must have been real, that is, it must have operated on the mind of the debtor as the dominant influence affecting him: *Boyd, Ex parte, Boyd, In re* (22), *Official Receiver, Ex parte, Bell, In re* (23), and it must not have been fraudulent, *Ex parte Reader, Wrighley, In re* (24), *Miller* v. *Sheo Prasad* (25), *Phulchand* v. *Miller* (26). In the case of *Official Receiver, Ex parte, Bell, In re* (23) it was observed that the preference is fraudulent, if it is established that, notwithstanding that the payment or disposition might never have been made but for the importunity of the creditor, it is also a fact that the payment never would have been made but for the desire to prefer—*Brown* v. *Kempson* (27) *Graham* v. *Candy* (28), *Ex parte Hall, In re Cooper* (17). To take another illustration, the

(6) (1883) 23 Ch. D. 69; 52 L. J. Ch. 717; 48 L. T. 450; 31 W. R. 878.

(7) (1883) 23 Ch. D. 695 at p. 704; 52 L. J. Ch. 903; 49 L. T. 278; 32 W. R. 177.

(8) (1886) 18 Q. B. D. 295; 56 L. J. Q. B. 195; 35 W. R. 148.

(9) (1897) 2 Q. B. 19; 66 L. J. Q. B. 554; 45 W. R. 577; 76 L. T. 742; 4 Manson 103

(10) (1865) 6 B. & S. 314; 34 L. J. Q. B. 68; 11 Jur. (N. S.) 154; 12 L. T. 22; 13 W. R. 407; 122 E. R. 1211; 141 R. R. 421.

(11) (1856) 2 Jur. (N. S.) 1225.

(12) (1900) 2 Q. B. 325; 69 L. J. Q. B. 703; 82 L. T. 722; 48 W. R. 652; 7 Manson, 291.

(13) (1810) 17 Ves. 247; 34 E. R. 95; 11 R. R. 70.

(14) (1856) 11 Exch. 647; 25 L. J. Ex. 182; 4 W. R. 292.

(15) (1870) 6 Ch. App. 70; 40 L. J. Bk. 22; 23 L. T. 650; 19 W. R. 137.

(16) (1809) 11 East 256; 2 Camp. 166; 103 E. R. 1003.

(17) (1882) 19 Ch. D. 580; 51 L. J. Ch. 556; 46 L. T. 549.

(18) (1870) 3 A. C. 213; 47 L. J. Bk. 11; 37 L. T. 758; 26 W. R. 62.

(19) (1875) 7 H. L. 839; 44 L. J. Bk. 129; 33 L. T. 541; 24 W. R. 463.

(20) (1899) App. Cas. 419; 68 L. J. Q. B. 866; 80 L. T. 841; 6 Manson, 264; 15 T. L. R. 418.

(21) 3 A. 530.

(22) 6 Morrell, 209.

(23) (1892) 10 Morrell 15.

(24) (1875) 20 Eq. 763; 44 L. J. Bk; 139; 33 L. T. 36.

(25) 10 I. A. 98; 6 A. 84; 13 C.L.R. 305; 4 Saraswati's P. C. J. 430.

(26) 7 A. 340; A. W. N. (1885) 33.

(27) (1850) 19 L. J. C. P. 169.

(28) (1862) 3 F. & F. 206.

presumption of fraudulent intention may be repelled, if it be apparent that the debtor acted in fulfilment of a prior agreement: *Halliday* v. *Holgate* (29), *Ex parte Kevan, In re Crawford* (30), *Ex parte Mackenzie, Bent, In re* (31), *Ex parte Hodgkin, In re Softley* (32). But it will not suffice to prove that the debtor was moved by a mere sense of honour or a sense of duty or of moral obligation, or that he acted from motives of kindness or of gratitude. *Suffolk, Ex parte, Fletcher, In re* (33), *Vingoe, In re, Viney, Ex parte* (34), *Bluckburn & Co., In re* (35), *In re Jukes, Ex parte Official Receiver* (36). In every case, as was said in *Sharp* v. *Jackson* (20), the state of mind of the debtor is the paramount consideration; the intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns: *In re Ramsay, Ex parte Deacon* (37). The case before us has not been considered from this point of view, and the facts must be fully investigated before an order of annulment can be made.

We may add that, on behalf of the appellants, a strenuous effort was made to sustain the view that if the creditor has acted in good faith and in ignorance of the intention of the debtor, he is protected from the operation of section 37. In our opinion this contention is not well founded, as under section 37 of the Provincial Insolvency Act, which is substantialy identical with section 48 of 46 & 47 Vict. c 52, good faith on the part of the creditor affords him no protection, where the intention of the debtor to give him a preference is established, although sub-section 2 of section 37 protects a person who, in good faith and for valuable consideration, has acquired a title through or under a creditor of the insolvent: see *Davison* v. *Robinson* (38), *Butcher* v. *Stead* (19) and *Sharp* v. *Jackson* (20), which show how the law on this point in England has undergone a material change in recent years. (Williams on Bankruptcy Practice, eighth Edition, page 258.)

The result is that these appeals are allowed, the order of the District Judge set aside and the case remanded to him for re-trial on additional evidence. The costs of these appeals will abide the result. We assess the hearing fee in each case at two gold *mohurs*.

Let the record be sent down as soon as possible.

BEACHCROFT, J.—I agree.

Appeals allowed; Case remanded.

(29) (1867) 17 L. T. 18.
(30) (1874) 9 Ch. Ap. 752.
(31) (1873) 28 L. T. 486, 42 L. J. Bk. 25.
(32) (1875) 20 Eq. 746; 44 L. J. Bk. 107; 33 L. T. 62; 24 W. R 68.
(33) (1891) 9 Morrell 8.
(34) 1 Manson, 416.
(35) (1899) 2 Ch. 725; 68 L. J. Ch. 764; 81 L. T. 520; 48 W. R. 186; 7 Manson, 47.
(36) (1902) 2 K. B. 58; 71 L. J. K. B. 710; 86 L. T. 456; 50 W. R. 560; 9 Manson, 249.
(37) (1913) 2 K. B. 80 at p. 84; 82 L. J. K. B. 526 108 L. T. 495; 20 Manson, 15; 29 T. L. R. 225.
(38) (1857) 3 Jur. (N. S.) 791.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 397 OF 1913.

March 8, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Trotter.

RAMANADHAN CHETTIAR—PLAINTIFF—APPELLANT

versus

ANNAMALAI CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Fraudulent decree, suit to set aside, when maintainable—Consequential relief, necessity of—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when not permitted.

A suit to declare that a decree is fraudulent and void will not lie unless followed up by a prayer for consequential relief, such as an injunction restraining the decree-holder from executing the decree. [p. 132, col. 2; p. 133, col. 1.]

A Court should not exercise its wide powers of amendment under Order VI, rule 17, of the Civil Procedure Code when the plaintiff has not availed himself of the other remedies open to him. [p. 133, col. 1].

Arunachalam Chetty v. *Rangasamy Pillai*, 28 Ind. Cas. 79; (1915) M. W. N. 118; 17 M. L. T. 154; 28 M. L. J. 118; *Kunhamed* v. *Kutti*, 14 M. 167; 1 M. L. J. 338, followed.

Second appeal against the decree of the District Court of Ramnad at Madura, in Appeal Suit No. 568 of 1912, preferred against that of the Court of the Temporary Subordinate Judge of Sivanganga, in Original Suit No. 90 of 1912.

Mr. *T. Rangaramanujachari*, for the Appellant.

Mr. *A. Krishnaswami Aiyar*, for the Respondents.

JUDGMENT.—We are of opinion that the plaintiff in this suit could not have been given a decree declaring that the decree in

Original Suit No. 42 of 1909 was fraudulent and invalid without a prayer in his plaint for consequential relief. Vide *Arunachalam Chetty* v. *Rangasamy Pillai* (1). The consequential relief necessary was an injunction restraining the 1st defendant (plaintiff in Original Suit No. 42) from executing his decree, vide *Kunhamed* v. *Kutti* (2). Whether the District Judge was right or wrong in thinking that he had no power to allow the plaintiff to amend his plaint in spite of the very wide language in which Order VI, rule 17, Civil Procedure Code, is worded, we are clearly of opinion that the circumstances of the present case were not such as to warrant an indulgence.

They are, *firstly*, that having applied without success to have the *ex parte* decree against him set aside, he did not appeal against the rejection of his application when that course was open to him; *secondly*, that it appears from the temporary Subordinate Judge's judgment that he was unwilling at the time of the trial of his suit to amend the plaint.

We must, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) 28 Ind. Cas. 79; (1915) M. W. N. 118; 17 M. L. T 154; 28 M. L. J. 118.

(2) 14 M. 167; 1 M. L. J. 338.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 164 OF 1914.

March 27, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

PARMA—APPLICANT—APPELLANT

versus

NEK RAM—OPPOSITE PARTY—RESPONDENT.

Probate and Administration Act (V of 1881), s. 50—Civil Procedure Code (Act V of 1908), ss. 114, 151—Inherent power of Court to set aside order made under Probate and Administration Act—Procedure—Notice—Person interested in estate of deceased—Zemindar, *right of.*

An order granting Letters of Administration to a particular person should not be cancelled without giving him notice. [p. 133, col. 2.]

It is open to a District Judge to re-consider an order granting Letters of Administration, whether under the provisions of section 114 or under the inherent powers of the Court recognized by section 151 of the Code of Civil Procedure, apart altogether from the provisions of section 50 of the Probate and Administration Act itself. [p. 134, col. 2.]

A Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir or one of the heirs of the deceased, has such an interest. A creditor also has an interest. [p. 134, col. 1.]

First appeal from an order of the District Judge of Agra, dated the 18th of September 1914.

Mr. *Nihal Chand*, for the Appellant.

Mr. *S. K. Dar*, for the Respondent.

JUDGMENT.

RICHARDS, C. J.—The facts connected with this appeal are as follows. It is alleged that one Sanwalia died intestate. The property left by him is said to be only a house in a village. One Parma applied for Letters of Administration to the estate of deceased and obtained an order on 18th of September 1914. The order was in the following terms: "Read application from the above-named petitioner, dated 18th August 1914, requesting that Letters of Administration to the estate of Sanwalia deceased, may be granted to him under Act V of 1881. Valued at Rs. 400. Order. This case has been uncontested. I grant Letters of Administration to Parma applicant for the estate of his deceased nephew Sanwalia; provided that if the valuation of the house made by the Collector exceeds the amount stated in the application the deficiency in fees shall be recovered." It appears that later on the same day one Nek Ram came into Court, with the result that the learned Judge passed the following order: "After passing the above *ex parte* order a petition has this day been filed. I cancel the above order and frame the following issue:—Is Parma the uncle and heir of the deceased Sanwalia"? Parma has come in appeal to this Court, contending that the order granting him Letters of Administration should not have been cancelled by the learned Judge without giving him notice. Nek Ram's contention admittedly is that Sanwalia died intestate and without heirs and that according to custom, the house reverts to him as *zemindar*. It seems to me that Parma having obtained an order granting him Letters of Administration, that order ought not to have been cancelled without giving him notice. This in itself

sufficient to dispose of the present appeal. I think, however, that it is right to point out a few matters to the learned Judge. It does not appear upon what evidence, if any, the order in favour of Parma was made. In my opinion a Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir, or one of the heirs, of the deceased has such an interest. A creditor also has an interest. In an insolvent's estate the creditor's interest is even greater than that of the heirs. I think even assuming that Parma had satisfied the Court that he had an interest as one of the heirs of the deceased, it ought to have ordered him to give security for the due administration of the estate of the deceased. I think also that it is a wise precaution for the Court to have clear evidence as to who are the other persons interested in the estate and as a general rule, to direct that such persons should get notice either that the application has been made or at least that the application for Letters of Administration has been allowed. The question whether or not the *zemindar* Nek Ram has such an "interest" as will entitle him to oppose the grant of Letters of Administration, will probably arise. It seems to me that Nek Ram has no "interest" in the estate of the deceased. His contention is that the moment Sanwalia died without heirs the house reverted to him. It is contended on behalf of Nek Ram that if Letters of Administration are once granted to Parma, the result would be that under the provisions of section 14 and section 59 the *zemindar* will never afterwards be allowed to say that Sanwalia died without heirs. If this is really the result of the provisions of the sections I have mentioned, it certainly would seem only just to allow Nek Ram an opportunity of contesting that Parma is the heir of the deceased. I, however, do not think that we are called upon to decide this question in the present appeal. I would set aside the order of the learned District Judge cancelling the order granting Letters of Administration and send the case back him, directing him to send notice of the objection of Nek Ram to Parma and then to proceed to consider the matter according to law.

PIGGOTT, J.—I entirely concur in what the learned Chief Justice has said and in the order proposed by him. It is only in regard to one matter that I wish to add a few words. In the arguments addressed to us in support of this appeal, it seemed to me that in the background of the appellant's case there lay the contention that he was in the position of a person holding Letters of Administration which could not be revoked at all, except under the provisions of section 50 of the Probate and Administration Act, V of 1881. Now no doubt the Court which has granted Leters of Administration has jurisdiction to take action under that section. But in the circumstances of the present case it is clear that other points would have to be considered before the case could be tied down to the provisions of that particular section. In the matter of an application for Probate or Letters of Administration, it is often impossible to apply strictly those rules of the Code of Civil Procedure which govern *ex parte* proceedings in cases where there is a defendant named at the very outset, on whom notice is required to be served. Neverthless the Court possesses, as is recognised by section 151 of the Code of Civil Procedure, inherent powers to make such orders as may be necessary for the ends of justice, or to prevent the abuse of the process of the Court. When Nek Ram laid his petition before the Court, what he desired to contend was that he was entitled to be heard *before* any Letters of Administration were granted to Parma at all. He still desires to raise this point in spite of the fact that an *ex parte* order allowing Parma's application had been passed before he was able to lay his petition before the Court. I only wish to say that it will be open to the learned District Judge when the matter comes back to him, to consider whether under the provisions of section 114, or under the inherent powers of the Court recognised by section 151 of the Code of Civil Procedure, he can or ought to re consider his *ex parte* order in favour of Parma, apart

altogether from the provisions of section 50 of the Probate and Administration Act itself.

RICHARDS, C. J.—I agree with what my learned colleague has said.

BY THE COURT.—The order is that we allow the appeal, set aside the order of the Court below and remand the case to that Court for trial according to law. Costs will be costs in the cause.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL SUIT NO. 199 OF 1914.

March 2, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

LODD GOVINDOSS KRISHNADOSS AND OTHERS—PLAINTIFFS

versus

RUKMANI BHAI—DEFENDANT.

Professional ethics—Counsel appearing in a cause—Propriety of his giving evidence.

Though it is no doubt desirable that Counsel ought not to appear in a case where it is probable that his evidence would be material, there is no inflexible rule that his evidence ought not to be taken, if at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice. [p. 136, col. 2; p. 137, col. 1.]

Messrs. *V. C. Seshachariar* and *V. V. Srinivasa Aiyangar*, for the Plaintiffs.

Messrs. *Venkatasubba Row* and *Radhakrishnayya*, for the Defendant.

JUDGMENT.—The plaintiffs pray for the reduction of the maintenance decreed to the defendant in Civil Suit No. 187 of 1906 from Rs. 400 to Rs. 100 a month, on the ground that the maintenance decreed in that suit was in respect of the defendant and her daughter and that, owing to her daughter having been married, her maintenance was no longer obligatory on the defendant. The plaintiffs also pray that the decree in Civil Suit No. 187 of 1906 may be rectified by declaring that the amount decreed in that suit was really for the maintenance of the defendant and her daughter and that the amount be reduced to Rs. 100 or such other sum as the Court may think proper.

The case for the plaintiffs is that defendant, who is the step-mother of the 1st plaintiff, filed Civil Suit No. 56 of 1906 in the High Court claiming *inter alia* maintenance for herself and her daughter, that the said suit was permitted to be withdrawn with liberty to file a fresh suit, as it was found that the suit was bad for misjoinder of parties and causes of action that she brought Civil Suits Nos. 187 of 1906 and 188 of 1906 claiming maintenance for herself and her daughter respectively, that the suits were heard together and compromised, the terms being that the plaintiff and her daughter should get Rs. 400 a month for their maintenance, that a decree was passed in Civil Suit No. 187 of 1906 awarding Rs. 400 for maintenance but that, by reason of some mistake, the decree, instead of stating that the maintenance was to be for the defendant and her daughter, simply states that the maintenance was to be for the defendant, that defendant's daughter was married in October 1913 and has attained puberty and gone to live with her husband and that, by reason of this fact, he has no longer to pay Rs. 400 a month but only Rs. 100.

The defendant filed a written statement, denying that the sum of Rs. 400 was the maintenance payable to her and her daughter and stating that the terms of the compromise are correctly set out in the decrees passed in Civil Suits Nos. 187 and 188 of 1906. She states that, although she claimed a much larger sum, Rs. 400 was, by consent of the parties, fixed for her maintenance, that her daughter was then of marriageable age, and that her maintenance was not taken into consideration when the settlement was arrived at. She also states that an application to amend the decree was made before Sir Arnold White but that it was refused, the Chief Justice holding that he had no power to vary his decree and that, even if he had, he would not do so on the merits. The defendant denies that the plaintiffs have any cause of action and states that the matter is *res judicata* and that the plaintiffs are not entitled to any relief. A preliminary issue was settled as to whether the plaintiffs are entitled to vary the terms of the *razinama* decree in Civil Suit No. 187 of 1906. For the reasons given in my judgment dated 8th December 1914, I held that the plaint disclosed a cause of action and that, on the allegations con-

tained in the plaint, the plaintiffs were entitled to sue. I also held that the suit was not barred by *res judicata*. The following additional issues were then settled:—

(*a*) Was it agreed that the maintenance of Rs. 400 should be paid to the defendant and her daughter as alleged in paragraph 6 of the plaint?

(*b*) If the 1st issue is found in plaintiffs' favour, are they entitled to any reduction in the maintenance allowed by the decree, and, if so, by what amount?

(*c*) Is the claim of the plaintiff for the rectification of the decree barred by limitation?

* * * *

The two Suits Nos. 187 and 188 of 1906 came on for hearing before Sir Arnold White and, after they were part-heard, a compromise was suggested and the terms of the compromise were admittedly settled in his Lordship's Chambers.

* * * *

The only evidence adduced before me to show that there was any mistake when the compromise decrees in Civil Suits Nos. 187 and 188 of 1906 were entered into, is the evidence of the plaintiff and of Mr. Narasimhachari, the junior Vakil who was present in the Chambers of Sir Arnold White. I may dismiss the evidence of the plaintiff as that of a person who is interested and whose attitude towards his step-mother has been throughout bitterly hostile. He set up the false plea that he was not personally liable and that the decree was wrong in that respect also, and the proceedings after the decree in Civil Suits Nos. 187 and 188 of 1906 show that he left no stone unturned to prevent the plaintiffs therein from realizing the fruits of their decrees. Mr. Narasimhachari, who was present when the compromise was entered into, admits in cross-examination that nobody expressly stated that the maintenance was to be for both the plaintiff and her daughter and that he does not remember if the daughter's name was mentioned. In answer to a question put by me, he stated that he understood that the arrangement was that Govindoss (1st plaintiff herein) should pay Rs. 400 to the defendant and that she should maintain her daughter, there being no arrangement as to how much should be paid for the daughter's maintenance. He winds up by saying that he cannot say what was understood by all the parties as regards the question of maintenance. All that this witness can state is that he was under the impression that the maintenance of Rs. 400 was to be for the plaintiff and her daughter, but how he came to be under that impression the evidence does not show. As against the evidence of the plaintiff and Mr. Narasimhachari, there is the evidence of Mr. Venkatasubba Row, who appeared for the plaintiff in Civil Suit No. 187 of 1906. He gave his evidence in a straightforward manner and I have no hesitation in accepting his evidence as to what took place in the Chambers of the late Chief Justice.

Objection was taken to Mr. Venkatasubba Row giving evidence, as he was one of the Vakils who appeared for the defendant. I cannot help remarking that the objection comes with very bad grace from the plaintiffs. At the settlement of issues, the plaintiffs were ordered to file a written statement before 16th December 1914 giving full particulars as to the date of the agreement mentioned in the first issue, the parties that were present at the time of the agreement and the parties between whom the agreement was come to. The plaintiffs did not file the particulars and their only excuse was that their Vakil forgot to do so. Though the plaintiffs would have only themselves to thank if the first issue was decided against them and the suit dismissed, I did not want to dismiss the suit, nor did Mr. Venkatasubba Row press for it as the non-filing of the particulars was due to an oversight of the plaintiff's Vakil. When the evidence was gone into, it was alleged that the compromise was in the Chambers of the late Chief Justice and names of the parties present were given. As soon as the plaintiff's evidence was over, Mr. Venkatasubba Row withdrew from the case and it was conducted by Mr. Radhakrishnayya. Under these circumstances I do not see what objection there could be to Mr. Venkatasubba Row giving evidence in this suit. Though it is no doubt desirable that Counsel ought not to appear in a case where it is probable that his evidence would be material, I do

not think that there is any inflexible rule that his evidence ought not to be taken, if, at any stage of the suit, it becomes necessary to do so. To lay down such a hard and fast rule would often defeat the ends of justice. I have no hesitation in holding that the evidence of the 1st plaintiff and Mr. Narasimhachari is utterly insufficient to show that there was any mistake in the terms as embodied in the decree in Civil Suits Nos. 187 and 188 of 1906.

I find on this issue that there was no mistake in the matter and that the real agreement at the time of the compromise was that Rs. 400 should be paid to the defendant, and not to the defendant and her daughter.

In the result the suit fails and is dismissed with costs.

Suit dismissed.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 353 OF 1913.

February 6, 1915.

Present:—Sir Alfred Kensington, KT., Chief Judge, and Mr. Justice Rattigan.

Musammat UMAT-UL-MUGHNI BEGUM—DEFENDANT No. 4—APPELLANT

versus

SALIG RAM AND OTHERS—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS.

Ex parte *decree—Costs—Procedure to be adopted, when date of hearing holiday*—Ex parte *decree, setting aside of—Costs, of adjournment—Appellate Court's power to cancel order of costs allowed by first Court.*

Where the date fixed for hearing a case happens to be a holiday, the Court is in no way justified in taking up the case on the following day and in passing any order to the prejudice of any of the absent parties without duly serving upon him a fresh notice of the hearing. [p. 138, cols. 1 & 2.]

Passing an *ex parte* decree without duly serving the summons upon the defendant is wholly unjustifiable and liable to be set aside unconditionally. [p. 138, col. 1.]

A party having good and sufficient reason for non-compliance with an order of a Court cannot be burdened with the costs of an adjournment. [p. 138, col. 1.]

Miscellaneous appeal from the order of the Additional District Judge, Delhi, dated the 28th August 1912, dismissing plaintiffs' application for setting aside the *ex parte* decree passed on 16th July 1912.

Mr. *Sundar Das*, for the Appellant.

Mr. *Raushan Lal*, for the Respondent.

JUDGMENT.—This is an appeal under Order XLIII, rule 1, clause (*d*), Civil Procedure Code, from the order of the Additional District Judge, Delhi, dated the 28th of August 1912, rejecting an application to set aside an *ex parte* decree passed against the appellant on the 16th of July 1912. It appears that on the 9th of March 1911, plaintiffs, Salig Ram and Mahesh Das, instituted a suit for recovery of Rs. 6,645 due on a mortgage-deed executed by defendants Nos. 1 to 3, and impleaded defendant No. 4, the present appellant, *Musammat* Umat-ul-Mughni as she claimed to be interested in the mortgaged property to the extent of 1/7th share. On the 5th July 1911, a decree was passed against defendants Nos. 1 to 3 on a confession of judgment and *ex parte* against defendant No. 4. On the 23rd of August 1911, appellant applied to have the *ex parte* decree set aside on the ground that she had not been duly served with notice of the date of hearing. The application was granted and the decree unconditionally set aside on the 5th of January 1912, the 7th of January being fixed as the date on which defendant No. 4 was to file her pleas. This order was duly complied with and on the 23rd of January issues were fixed, and the case was put down for evidence for the 20th of February. At the hearing on the 20th February, plaintiffs produced certain witnesses who were duly examined, and then stated that they relied upon certain documents in the possession of defendant No. 4. The latter's *mukhtar* pointed out that his client was at Hyderabad, and that she did not intend to call any evidence in support of her pleas. He was directed to produce the documents referred to by the plaintiffs and the 14th of March was fixed for the next hearing. On that date the defendant's *mukhtar* stated that his client was "out in camp in Hyderabad with her husband," and that the documents called for had not reached him. Thereupon the Court adjourned the case to the 29th of March, and directed defendant No. 4 to pay Rs. 30 as costs of the adjournment. On the 29th of March neither defendant No. 4 nor her *mukhtar* was present and the costs directed to be paid by the Court's order of the 14th of March had not been paid. The Court accord-

ngly passed an *ex parte* decree against defendant No. 4. On the 29th of April, defendant No. 4 filed an application praying that the *ex parte* decree might be set aside, on the ground that she herself was at Hyderabad, that her *mukhtar* was ill on the date fixed for the last hearing, and that her Counsel on that date was absent from the station. On the 13th of June the Court, passed an order directing that if defendant No. 4 paid the sum of Rs. 30 as costs in addition to the sum of Rs. 30 previously ordered to be paid by her into Court. the *ex parte* decree would be set aside. The case was fixed for hearing on the 15th of July. The day last mentioned happened to be a holiday and the Court was shut, but the case was taken up on the 16th of July; and as defendant No. 4 was not present and the costs had not been paid, her application of the 29th April was rejected. On the 12th of August she applied for restoration of her application on the ground that the Court was closed on the 15th of July, the date fixed for the hearing, but her application was summarily rejected on the 28th of August. It is from this last order that the present appeal has been filed.

We have no hesitation in holding that the procedure adopted by the Court has been wholly unjustifiable from the very outset. In the first place, the original *ex parte* decree was passed in spite of the fact that defendant No. 4 had not received notice of the date of hearing. Then, on the 14th of March she was directed to pay Rs. 30 as costs for adjournment, though it must have been obvious to the Judge that there was good and sufficient reason for her non-compliance with the order of the 20th of February inasmuch as she happened to be out in camp with her husband, an official of the Hyderabad State, and presumably, therefore, not in a position to get hold of the papers required by the plaintiffs. Again, on the 13th of June the Court was apparently satisfied that she had shown good cause for setting aside the *ex parte* decree passed on the 29th of March, but nevertheless directed her to pay a further sum of Rs. 30 as a condition precedent to setting aside the *ex parte* decree. Finally, the Court was in no way justified in taking up the case on the 16th of July without giving notice to the appellant. The date of hearing had been fixed for the 15th of July, and as the Court was shut on that date, no order to the prejudice of the appellant should have been passed in her absence on the following day. We accordingly accept this appeal and set aside all the orders of the Court below passed subsequently to the 20th of February 1912; the result being that defendant No. 4 should now be called upon to produce by a date, to be specified by the Court, the documents called for by the plaintiffs, and thereafter the case to proceed in accordance with law. We wish it to be distinctly understood that the orders of the 4th of March and the 13th of June 1912, directing payment of costs by defendant No. 4, are expressly set aside. As it is the Court rather than the parties that has been in fault upto date, we leave the latter to bear their own costs in this Court.

Petition allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 92 OF 1913.

February 24, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

M. SUBRAMANIAM PILLAI—PLAINTIFF—APPELLANT

versus

Sri GOPALARAMA SUBRAMANIA AIYAR, MINOR, BY HIS MOTHER AND GUARDIAN ANANDAMMAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), *s.* 66—*Purchase in Court auction as* benamidar—*Agreement by purchaser to execute sale-deed in favour of plaintiff* —*Suit, whether maintainable.*

A suit for execution of a sale-deed and for recovery of possession on the ground that the defendant's father purchased the suit properties as *benamidar* for the plaintiff, falls within the scope of section 66 of the Civil Procedure Code and is barred. [p. 139, cols. 1 & 2.]

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly in Original Suit No. 40 of 1911.

Messrs. *S. Srinivasa Aiyangar* and *S. Ramaswamy Aiyar*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *M. Krishnamachari*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff against a decree of the Subordinate Judge, Tinnevelly. The plaintiff alleged

in his plaint that it was agreed between the plaintiff and Chidambara Iyer, father of the defendant, that the latter should purchase the properties now in suit on behalf of the plaintiff at a sale in execution of a decree with the money which the plaintiff agreed to pay to him, and that the properties should be taken possession of through Court; that Chidambara Iyer should enjoy for four years the income from the said properties in satisfaction of all debts incurred on those properties; that after four years the properties should be put into plaintiff's possession free of all incumbrances and that Chidambara Iyer should execute a sale-deed to plaintiff in respect of them. In accordance with these arrangements, the plaintiff states that the properties were purchased by Chidambara Iyer as plaintiff's agent with plaintiff's money and that he remained in possession. The plaintiff now sues for the execution of a sale-deed and for recovery of possession. The suit was dismissed by the Subordinate Judge as he was of opinion that it is barred by section 66 of the Civil Procedure Code.

The plaintiff appeals. The section enacts that "no suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." When the plaintiff was examined as a witness in the case, he admitted that the defendant's father Chidambara Iyer purchased the suit properties in Court auction as *benamidar* for him. And he again repeated the statement that "the agrement between myself and defendant's father was that he should purchase the properties for me as *benamidar* and that he should enjoy the properties for four years," in accordance with the arrangement referred to. This statement that the purchase by the defendant's father was *benami* for the plaintiff was repeated in the plaint and also in his deposition as his witness.

It was argued before us that as there was an agreement to execute a conveyance in favour of the plaintiff, section 66 does not bar the suit. But the conveyance was to be executed by the defendant's father on the ground that he was a *benamidar*. It was not intended thereby that he should convevy any title which was vested in him to the plaintiff. The allegations in the plaint do not show that any title was vested in the defendant, that he purchased the property on his own behalf as the owner of the property. It appears to us that the case falls clearly within the scope of section 66, Civil Procedure Code.

We accordingly confirm the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 10 OF 1912.

February 24, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

CHANDRA MOHAN BANERJEE—DEFENDANT No. 1—APPELLANT

versus

SATYA KRIPAL BANERJEE—PLAINTIFF AND OTHERS—*Pro forma* DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagor, payment by, to one mortgagee—Endorsement on mortgage-deed, value of—Payment, whether amounts to discharge—Mortgagor, duty of—Probate and Administration Act (V *of* 1881), *ss.* 4, 92 *—Endorsement as to receipt of mortgage-money by one executor mortgagee, value of.*

Two of the sons of a deceased testator were made executors of his Will. The two sons invested the moneys they had in their hands in mortgages. One of the brothers alone sued to enforce the mortgage security making the other brother defendant. The mortgagor pleaded payment of certain amounts to the other brother, as evidenced by endorsement on the mortgage bond, and claimed to be credited for the amounts:

Held, that notwithstanding that the money in fact formed a portion of the estate of the deceased, it did not vest in the executors as such under section 4 of the Probate and Administration Act, but vested in them by virtue of the bonds which were given to them by the mortgagor and that, therefore, the endorsement did not amount to a discharge under section 92 of the Act. [p. 140, col. 2.]

Held, further, that the money was lent on a joint account and it was the duty of the defendant mortgagor in making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. [p. 140, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Hoogly, dated the 16th of September 1911.

Babus *Mohendra Nath Roy* and *Hiralal Sanyal*, for the Appellant.

CHANDRA MOHAN BANERJEE *v.* SATYA KRIPAL.

Babus *Dwarka Nath Chakravarti*, *Jogendra Nath Mukherji*, Dr. *Dwarka Nath Mitter* and Babu *Bijoy Coomar Bhattacharyya*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Additional Subordinate Judge of Hoogly dated the 16th September 1911. The suit out of which the present appeal arises is a suit brought to enforce certain mortgage securities. It appears that one Satya Dayal Banerji, who died as long ago as the 30th May 1897, left a Will, dated the 11th January 1897, under the terms of which the plaintiff and the defendant No. 2 in this case, who are his sons, were executors. The defendant No. 3 is the only other son of the deceased Satya Dayal Banerji. In accordance with their duties as executors the plaintiff and respondent No. 2 had in their hands certain moneys and these moneys they invested in these mortgage securities, the mortgagor in each case being the defendant No. 1. These mortgages were dated respectively the 6th November 1898, the 10th February 1899 and the 20th April 1899, and the respective principal sums were Rs. 14,000, Rs. 10,000 and Rs. 9,550-8-6. The plaintiff, apparently later on, had disputes with his brother, the defendant No. 2, and the present suit was brought by him to enforce these mortgage securities. He appears as the sole plaintiff in this case and his brothers have been joined as defendants.

The only question that is in dispute in this case is as to certain items that appear endorsed in the mortgage bonds as having been paid, it is said, to the defendant No. 2 by the defendant No. 1. It is said that this endorsement is a good receipt and that these sums ought to be given credit to the defendant No. 1. In the first place I disagree in the proposition of law that has been put forward by the learned Vakil for the appellant. This is not a case governed by section 92 of the Probate and Administration Act at all. Section 92 applies to property which the English lawyers say rests in the executor *virtute officii*. That appears from section 4 of the Probate and Administration Act. It is the property that lies vested in him, that is, the executor as such, that section 92 applies to. The illustrations to section 92 make it clear. In a system of law such as exists in England where there is a distinction between real and personal estates, it is a matter of some importance. But here where there is only one class of property, the matter is not of such great importance. Where the executor derives his title to a lease-hold by virtue of his office, it is frequently in English law a matter of great importance. When one looks at illustration (*b*) of section 92, it will appear that one executor has power to surrender a lease, that is because the lease vests in him as such, as mentioned in section 4 of the Act. The right under these bonds, notwithstanding that the money did, in fact, form a portion of the estate of the deceased, did not vest in the executors as such under section 4 of the Act, but vested in them under and by virtue of the bonds which were given to them by the defendant No. 1. That being so the money was lent on a joint account and it was the duty of the defendant No. 1 on making re-payment to see that he made the payment to, and obtained a receipt from, a person entitled to give him a discharge. So even if I come to the conclusion that the learned Judge of the Court below was wrong in the findings of fact, I should agree in the result that he has arrived at. The learned Judge, it seems to me in a case like this, was in a far better position than any Appellate Court is in, where the question is purely as to the weight and value to be attached to the evidence of certain witnesses that the Judge had before him and where he was able to appreciate the evidence that was given in his presence. We are not in an equal position and we are not entitled, unless we come to the conclusion that the learned Judge was clearly wrong in the conclusion that he arrived at, to distrub the findings of fact made by him. The learned Judge having these witnesses before him has come to the clear finding that the defendant No. 1 and defendant No. 2 acted in collusion to cheat the estate of the deceased Satya Dayal Banerji. If that be so, no weight can be attached to any statement of either of these witnesses unless it is supported by good and independent evidence. A great deal has been made of the admission by the defendant No. 2 that

he was deceived of these sums that are alleged to have been paid by the defendant No. 1, a sum of Rs 4,939-10-6 payable on the second bond and another sum of Rs. 400 payable on the third bond. But the learned Subordinate Judge has disbelieved the whole of this story. How can we, in appeal, not having seen the witnesses, say that these people were telling the truth, that we should hold that their evidence ought to be believed and that the statements made by these witnesses proving the payments ought to be given a greater weight than the learned Subordinate Judge has given them, and that we ought now to come to the finding that these payments were in fact made? Then, it is said that the learned Subordinate Judge was biassed as against the defendant No. 1, because he was the co-defendant in a divorce case and got off what the learned Judge calls scot-free. But I am satisfied on the judgment that it was not that only that made the learned Judge take an unfavourable view of the evidence given by the two defendants. The real fact is that he had before him the whole of their evidence, he disbelieved that evidence and disbelieved the genuineness of the endorsements that are on the bonds. I see no reason why we should differ from the findings of fact made by the learned Judge, and I think we ought not to disturb those findings on the evidence as it now stands before us. Far from thinking that the learned Judge has come to a wrong conclusion, so far as I have been able to form an independent estimate of the evidence, I think that if I had been in the position of the learned Judge of the Court below, I would have arrived at a similar conclusion.

The only other point that was raised in this appeal is as to the form of the decree. The learned Subordinate Judge had before him all the parties interested in the estate of the deceased Satya Dayal Banerji, namely the plaintiff, the defendant No. 2 and the defendant No. 3, and thought it proper to give one-third of the mortgage-money to each of them, that being the share which each of them is entitled to, apparently under the terms of the Will, although, as a matter of fact, the Will has not been given in evidence. The only point raised is that the defendant No. 2 admitted that he had received Rs. 4,939-10-6 and Rs. 400 out of the mortgage-money and had endorsed these payments on the back of the second and third mortgage bonds, and it is said that at any rate thedefendant No. 1 should have received credit as against the defendant No. 2 for these two sums so endorsed, which have been admitted by the defendant No. 2 to have been received by him. The learned Judge did not assent to that view and apparently on this ground, namely, that he was not bound by the admission and he disbelieved the admission; and, therefore, he thought that he ought to make a decree for the whole amount of the mortgage-money. What has happened as a matter of fact is, that the greater portion of the mortgage-money has been paid into Court by the defendant No. 1 and by an order of the Court it has been drawn out by the plaintiff, the defendant No. 2 and the defendant No. 3 in equal shares. So now it would not be convenient for the Court to alter that portion of the decree declaring that the defendant No. 2 should get one-third of the amount realized under the terms of the mortgage-deeds. The defendant No. 1 paid the money into Court, I suppose, on terms as to the stay of execution of the decree that then stood, and he must have known when he did that, that the Court might order that that money should be paid out on the terms of the decree then existing. Any right that he has got against the defendant No. 2 in respect of these sums which the defendant No. 2 says he has received, he will be able to enforce in an independant suit. I think it would not be convenient now to disturb the decree so far as the defendant No. 2 gets $\frac{1}{3}$rd share of the mortgage-money, when in fact he has already received a greater portion of his $\frac{1}{3}$rd share. On the whole I come to the same conclusion as the learned Subordinate Judge has come to and in my opinion the present appeal fails and must dismissed with costs to the plaintiff only.

TEUNON, J.—I agree.

Appeal dismissed.

LAKSHMI ACHI *v.* SUBBARAMA AIYAR.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 151 OF 1914.

March 10, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

LAKSHMI ACHI—PETITIONER—APPELLANT

versus

SUBBARAMA AIYAR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 12, O. XXII, rr. 2, 3, 4, 10; O. XXXIV, rr. 2, 3; O. XLIII, r. 1 (l)—Preliminary decree, suit if continued till final decree after passing of—Suit by executors on mortgage in favour of estate of deceased testator—Death of executors—Right of widows to be brought on record as legal representatives of deceased testator—Application under O. XXII, r. 3—Order, whether appealable—Transfer of Property Act (IV of 1882), ss. 88, 89.

Under the Civil Procedure Code of 1908, after the passing of a preliminary decree, the suit is continued until the stage of final decree is reached. [p. 143, col. 2.]

Malikarjunadu Setti v. *Lingamurti Pantulu*, 25 M. 244; 12 M. L. J. 279; *Abdul Majid* v. *Jawahir Lal*, 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 36 A. 350; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; *Ashfaq Husain* v. *Gauri Sahai*, 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140; *Munna Lal Parruck* v. *Sarat Chandra Mukerjee*, 27 Ind. Cas. 683; 21 C. L. J. 118; 17 M. L. T. 120; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 498, distinguished.

A widow of a deceased testator cannot apply to be brought on record as the "legal representative" on the death of the executors who instituted the suit. The term "devolution" in Order XXII, rule 10, means the devolution of the interest of the person who instituted the suit. [p. 144, col. 1.]

Ferral v. *Curran*, (1899) 2 Ir. R. 470; 33 Ir. L. T. R. 90; 4 Irish Law Reports 850; *Rikhai Rai* v. *Sheopujan Singh*, 7 Ind. Cas. 97; 7 A. L. J. 960; 33 A. 15; *Gandi Ramaswami* v. *Puramsetti Pedamunayya*, 27 Ind. Cas. 1001; 17 M. L. T. 186, followed.

An application to be brought on record by such a widow could be made only under Order XXII, rule 3, and as orders on such applications are not made appealable under Order XLIII, rule 1, no appeal lies from an order rejecting such an application. [p. 144, cols. 1 & 2.]

Appeal against an order of the Court of the Subordinate Judge of Mayavaram, in Insolvency Appeal No. 6 of 1914 in Original Suit No. 40 of 1911.

FACTS.—One Arunachalam Chetty died issueless, leaving two widows him surviving. By his last Will and testament he appointed two executors and he also disinherited the senior widow. In respect of a mortgage outstanding in the name of the deceased the executors instituted a suit, but one of them having died before the preliminary decree and the other after, the junior widow was brought on record. The senior widow then applied to be brought on record as the legal representative of the deceased jointly with her co-widow, and this application was dismissed by the Subordinate Judge of Mayavaram. Against this order the senior widow preferred this civil miscellaneous appeal.

Mr. *S. Srinivasa Aiyangar* (with him Mr. *G. S. Ramachandra Iyer*), for the Respondents, raised a preliminary objection that no appeal lay either under Order XLIII, rule 1, or under section 47, as the proceedings from the stage of a preliminary decree and up to the final decree are proceedings in the suit itself and are not by way of execution and as until the final decree is passed, there is no executable decree in the suit. Reference was made to the deliberate change in the language of Order XXXIV, rules 2 and 3, which substituted the word 'decree' for the word 'order' in the corresponding section 19 of the Transfer of Property Act.

Messrs. *T. Rangachariar* and *C. V. Anantakrishna Iyer*, for the Appellant:—After the preliminary decree the procedure to be followed in obtaining a final decree is by way of execution only. It is, therefore, competent to the appellant to come in and pray for being made a party and hence to appeal against any adverse order. *Vide* Explanation to section 2 (2), read with section 47, Civil Procedure Code. *Vide* also *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1), *Ashfaq Husain* v. *Gauri Sahai* (2) and *Munna Lal Parruck* v. *Sarat Chandra Mukerjee* (3), where it has been held that a preliminary decree is executable. Again by way of analogy under Order XX, rule 12, a preliminary decree relating to possession is executable independent of a provision for the passing of a final decree regarding mesne profits. Then again the estate having devolved on the appellant upon the death of the executors, she was entitled to come in under Order XXII, rule 10, Civil Procedure Code.

Mr. *S. Srinivasa Aiyangar*, in reply:—The cases quoted, *viz.*, *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1), *Ashfaq Husain* v. *Gauri Sahai* (2) and *Munnu Lal Parruck* v. *Sarat Chandra*

(1) 25 M. 244; 12 M. L. J. 279.

(2) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140.

Mukerjee (3) do not apply. They are decisions under the Transfer of Property Act. In fact in the case of *Ashfaq Husain* v. *Gauri Sahai* (2), Counsel expressly admitted that the present contention was not tenable under the new Code. A decree for mesne profits is not a necessary sequel to a decree for possession. Order XXII, rule 10 is not applicable. The devolution therein referred to must be that of the interest of the plaintiff who instituted the suit. The use of the words 'assignment' and 'creation' are very suggestive. See *Ferral* v. *Curran* (4), where a remainder-man was not allowed to continue a suit instituted by a tenant-for-life. This decision was under Order XVII, rule 2, Judicature Act, corresponding to Order XXII, rule 10. The Legislature has provided for cases of interest other than those of the person suing. Vide Order XXII, rules 3 and 4, read with section 2 (11) and *Rikhai Rai* v. *Sheopujan Singh* (5) and *Gandi Ramaswami* v. *Puramsetti Pedamunayya* (6). Further, the application to the lower Court was under Order XXII, rule 3, and no appeal lies against an order passed under that rule.

JUDGMENT.—One Arunachalam Chetty died leaving two widows. Prior to his death, he executed a Will on the 25th July 1904. Two persons were appointed executors under it. They brought Original Suit No. 49 of 1911 on the deed of mortgage executed to the deceased testator. One of the executors died before the preliminary decree in the suit was passed, and the other after it. An application was presented by the appellant, the senior widow of the deceased, to continue the suit. It was opposed by the respondent, the junior widow. The Subordinate Judge dismissed the application. This appeal is against that order.

Mr. S. Srinivasa Aiyangar raised the preliminary objection that no appeal lies against the order of the lower Court. The question has been argued very fully before us by the learned Vakils for the appellant and respondent. We have to come to the conclusion that the preliminary objection must be upheld.

Mr. T. Rangachariar's first contention is that after the passing of the preliminary decree in a mortgage suit, the procedure leading up to the final decree is only by way of execution and that consequently his client, the appellant, is entitled to initiate proceedings in that behalf. We are of opinion that this argument is not open to the appellant after the amendment of the Code of Civil Procedure, which by Order XXXIV now regulates the procedure relating to the execution of mortgage decrees. It was held in *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1) that the preliminary decree passed in a mortgage suit is the only executable decree and that proceedings for obtaining the final decree could be taken only by way of execution. This view was based mainly on the language of section 89 of the Transfer of Property Act, which says: "the plaintiff or the defendant, as the case may be, may apply to the Court for an *order* absolute for sale of the mortgage property." The recent decision of the Judicial Committee in *Abdul Majid* v. *Jawahir Lal* (7) is in favour of the view taken in the Madras Full Bench case. The use of the word *order* in section 89, in contradistinction to the word *decree* in section 88, was responsible for numerous decisions which were not easily reconcilable. The Legislature intervened, and in Order XXXIV speaks of both the adjudications as decrees (See rules 2 and 3). Therefore, after the passing of the preliminary decree, the *suit* is continued until the stage of final decree is reached. It is not by the process of execution that the final decree is obtained. Mr. Rangachariar refers to the explanation to the definition of decree, and argues that when read with section 47, the proceeding referred to in the Explanation really relates to execution. Had it not been for the deliberate change in the language of Order XXXIV, this contention would have force. The decisions of the Judicial Committee of the Privy Council in *Ashfaq Husain* v. *Gauri Sahai* (2) and *Munna Lal Parruck* v. *Sarat Chundra Mukerjee* (3) relate to the language of sections 88 and 89 of the Transfer of Property Act, and not to the amended provision of the Code of Civil Procedure. In the former case, Counsel expressly stated that under the

(3) 27 Ind. Cas. 683; 21 C. L. J. 118; 17 M. L. T. 120; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408.

(4) (1899) 2 Ir. R. 470; 33 Ir. L. T. R. 90; 4 Irish Law Reports 850.

(5) 7 Ind. Cas. 97; 7 A. L. J. 960; 33 A. 15.

(6) 27 Ind. Cas. 1001; 17 M. L. T. 186.

(7) 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 36 A. 350; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483.

Code it would not be possible to argue that the preliminary decree is executable. It was further argued by the learned Vakil that as the preliminary decree relating to possession (under Order XX, rule 12) is executable independently of the final decree as to mesne profits, it follows that a preliminary mortgage decree is executable. A decree for mesne profits is not, strictly speaking the final stage of the decree for possession. They relate to two different rights: and the fact that an exception is made in such cases is not an argument for holding that all preliminary decrees are executable.

Mr. Rangachariar's next contention is that his client is a person on whom the estate has devolved upon the death of the executors and that her application must be treated as one falling under Order XXII, rule 10, of the Code of Civil Procedure. We were at first inclined to think that the devolution referred to in this rule was of the same character as is referred to in the definition of '*Legal representative*' in the Code (section 2, clause 11). Mr. S. Srinivasa Aiyangar has satisfied us that rule 10 is not open to that interpretation. The term legal representative is used in rules 3 and 4 of the Order and does not find a place in rule 10. The plain language of the rule suggests that the devolution of the interest must be that of the plaintiff who has instituted the suit. The words 'assignment' and 'creation' indicate that it is the person suing that assigns and creates the interest which enables the assignee to continue the suit. We think that "devolution" which is by operation of law must also relate to the interest of the party to the suit. Under the corresponding rule in the Judicature Act (Order XVII, rule 2), it was held that where a tenant-for-life who brought the suit died, the remainder-man was not entitled to continue the suit [*Ferrall* v. *Curran* (4)]. The same construction must be adopted with reference to rule 10. The Legislature has provided for cases in which the interest devolving is not that of the deceased plaintiff, but is that of the person whose right of action the deceased plaintiff sought to enforce as representing his estate. Rules 3 and 4 of Order XXII, read with section 2, clause 11, cover such cases. It is on this principle it has been held that a reversioner can continue the suit instituted by a widow. See *Rikhai Rai* v. *Sheopujan Singh* (5), and *Gandi Ramaswami* v. *Puramsetti Pedamunayya* (6). It has to be noted that the application of the appellant in the lower Court was under rule 3, Order XXII. The Legislature has chosen not to give a right of appeal against orders passed under that rule, whereas under Order XLIII, rule 1 (*l*), orders with reference to rule 10 are appealable. We must, therefore, hold that this appeal is incompetent.

The appellant will pay the costs of the respondent.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 641 OF 1914.

April 26, 1915.

Present:—Justice Sir P. C. Banerji, KT.

BHAGIRATHI NONIYA—DEFENDANT—APPELLANT

versus

SUKHDEO NONIYA—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 152—Clerical error in judgment—Correction—Jurisdiction.

A Munsif, by a clerical error, recorded in his final order an order dismissing the suit instead of decreeing it. The decree was prepared in accordance with the final order:

Held, that the Munsif had jurisdiction under section 152 of the Civil Procedure Code to subsequently correct the error.

Second appeal from a decision of the District Judge of Benares at Jaunpur, dated the 17th February 1914.

Mr. *Iqbal Ahmad*, for the Appellant.

Dr. *Suleman*, for the Respondent.

JUDGMENT.—The only question raised in this appeal is whether the learned Munsif was justified in correcting his judgment and decree. What happened was that the plaintiff brought a suit for possession of property left by one Sheoraj, claiming the whole of it on the ground that he was the only son of Sheoraj. The defendant Bhagirathi claimed to be another son of Sheoraj by another wife. This was denied on behalf of the plaintiff, and the Court of first instance found that the defendant was not the son of Sheoraj and that the plaintiff alone was entitled to the property. By a clerical error, instead of recording a decree in favour of the plaintiff, the final order of the Munsif was one of dismissal of the suit, a decree was drawn up in accordance with this judgment. It having been brought to the notice of the

learned Munsif that an error had crept into the judgment, he corrected the judgment and the decree and substituted for the word "dismissed" the word "decreed". It is urged that the Munsif had no power to make this correction and that his original decree dismissing the suit should hold good. I do not agree with this contention. Section 152 of the Code of Civil Procedure was enacted clearly with the object of enabling the Court to correct clerical mistakes made by it in the judgment or decree or in any order. The Munsif's judgment shows that the findings were all in favour of the plaintiff and that he intended to decree the claim. It was only by an oversight that he wrote out an order of dismissal. After the correction of the judgment and the decree the defendant appealed to the District Judge and on the merits the learned Judge found against the defendent. So that neither on the point of law nor on the merits the defendant-appellant had any case. I dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 397 OF 1914.

February 9, 1915.

Mr. Justice Ayling and Mr. Justice Tyabji.

MUSALIUM VEETIL THEYATHIL MAHAMMADUNNI—DEFENDANT-No. 1—APPELLANT

versus

KUDUMPALATH PADINHARA PARAMBIL BAVA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 3 TO 7 AND 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 83, 84—Deposit of mortgage amount, when valid—Interest, when ceases to run.

It is only the actual payment of the full mortgage amount into Court that makes interest on the mortgage amount cease to run under section 84 of the Transfer of Property Act, and not a mere presentation of a petition for that purpose under section 83 of the Act. [p. 145, col. 2.]

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 206 of 1913, preferred against that of the Court of the District Munsif of Ponnani in Original Suit No. 626 of 1911.

FACTS.—A petition under section 83, Transfer of Property Act, for depositing the sum of money due on a certain mortgage was filed on 3rd August 1910 but the deposit was actually made on 10th August 1910. The sum so deposited represented only the amount due on 3rd August 1910. The mortgagee refused to receive the money. The plaintiff then filed the present suit for redemption claiming that the mortgagee was not entitled to interest, as the deposit disentitled him to the same. The lower Appellate Court found that the deposit was valid and decreed the suit. The mortgagee appealed.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant :—The deposit is not valid, as what was deposited was the amount due on 3rd August 1910 and not on 10th August 1910, the date on which the deposit was actually made. The appellant is, therefore, entitled to interest disallowed. To disentitle the appellant to interest the deposit must be that of the full amount due on the date of deposit.

Mr. *K. P. M. Menon*, for the Respondents :—The petition was filed on 3rd August 1910 and the deposit could only be of the amount due on that date. It is the date of petition and not that of the deposit that is material. The appellant is, therefore, not entitled to interest under section 83 of the Transfer of Property Act.

JUDGMENT.—The parties have been litigating for a very small amount, unless (as seems probable from the District Munsif's judgment) the real question at issue between them was not that which is argued before us, but whether the one side or the other was entitled to the documents referred to in the third issue.

Before us the only argument has had reference to the question whether the respondent had validly deposited under section 83 of the Transfer of Property Act the amount of the mortgage due to the appellant. The learned District Judge has held that there was a valid deposit. We find, however, that the respondent put in a petition for deposit on the third of August 1910, and yet the sum was not deposited till the 10th of August and on that day he brought into Court only the sum due as on the 3rd of August. This was clearly not the proper amount, and his deposit was consequently not valid and technically the deposit cannot prevail so as to stop interest running under section 84 of the Transfer of Property Act. We must, therefore, vary the decree under appeal by allowing

interest till redemption, for which we extend the time to three months from this date.

Both sides have been in the wrong as to their attitude in the lower Courts, and neither has made any effort at meeting and minimising the question at issue between them. We think the proper order as to costs will, therefore, be that the lower Appellate Court's order for costs stand and to make them bear their own costs in this Court. We order accordingly.

The memorandum of objections is dismissed without costs.

Appeal partly allowed; *Decree modified.*

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 559 OF 1914.

January 12, 1915.

Present:—Mr. Justice Rossignol.

IMAM-UD-DIN—DEFENDANT—APPELLANT

versus

KHUDA BAKHSH AND ANOTHER—PLAINTIFFS —RESPONDENTS.

Limitation—Pre-emption—Starting point of prescribed period—Land in possession of vendee at date of sale—Mutation of names.

The vendor in 1906 sold three fields by three sale-deeds, by transferring each one-third share out of each of the three fields to vendees who were father and son. Two of the fields were at the date of sale in the possession of the father vendee under a mortgage and the third he cultivated as a *tenant* before 1906 and in 1907-08 and in subsequent years. In 1906 the mutation was refused on the ground that the vendor had not transferred possession to the vendees. Subsequently mutation having been sanctioned in 1912 the plaintiffs brought the present suit for pre-emption:

Held, that since the vendees did not take possession of any portion of the land *under the sale* the period of limitation for the suit commenced from the date of mutation.

The taking of possession under a sale is an overt act fixed as the terminus *a quo* for limitation because it constitutes a publication of the transfer.

First appeal from an order of the Additional Divisional Judge, Ferozepur Division at Ludhiana, dated the 27th May 1913, reversing that of the Munsif, 2nd Class, Zira, dated the 2nd May 1913, decreeing plaintiffs' claim.

Mr. *Asquith*, for the Appellant.

Lala *Dharam Das Suri*, for the Respondents.

JUDGMENT.—The only question in this case is that of limitation. The vendor purported to sell to vendees, Imam-ud-Din and Ismail, father and son, in December 1906, the area in dispute, consisting of three fields.

The sale-deeds are three in number and each one purports to sell a $\frac{1}{3}$rd share out of each

of the three fields. Imam-ud-Din was already in possession of two of the fields under an earlier mortgage from vendor. The taking of possession under the sale is an overt act fixed as the terminus *a quo* for limitation, because it constitutes a publication of the transfer.

In respect of these two fields, no possession was taken by vendee under the sale, for he was already in possession of the whole. As for the remaining field 5743, it is clear that Imam-ud-Din had cultivated that also as a tenant for many years. In 1906-07, Nur Muhammad, co-sharer, tilled it with his own hand and the mutation of the sales was rejected because Imam-ud-Din was not in possession. In 1907-08, Imam-ud-Din again cultivated as a tenant under Nur Muhammad. There is the same entry in 1908-9, but in 1909-10 there is a note of the sale to Imam-ud-Din only, but this is unjustified by any mutation. In 1910-11, Imam-ud-Din alone cultivates as a tenant. It was only in 1912 that mutation was sanctioned. It is clear from this analysis that the vendees did not take possession of any portion of land *under the sale* and limitation runs from mutation. The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 225 OF 1912.

March 16, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

THE SECRETARY OF STATE FOR INDIA—DEFENDANT—APPELLANT

versus

JWAHIR LAL—PLAINTIFF—RESPONDENT.

Pensions Act (XXIII of 1871), ss. 4, 6—Assignment of Government revenue—Declaration—Power of Civil Court—Jurisdiction.

A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay a grant of Government revenue to any person. [p. 148, col. 2.]

First appeal from the decision of the Subordinate Judge of Shahjahanpur, dated the 4th April 1912.

Mr. *Ryves*, for the Appellant.

Mr. *B. E. O'Conor* (with him Messrs. *Benode Bihari* and *S. K. Dar*), for the Respondent.

JUDGMENT.—This appeal arises out of

a suit in which the plaintiff claimed a declaration that he has "proprietary rights in ten *biswas* of revenue-free grant in each of the three *mahals* Nur Muhammad, Farhat Fatima and Intizamuddin in *Mouza* Lakhimpur," and that the name of the Government may be expunged. The claim does not appear to be accurately expressed. What the plaintiff really claims is that in the events which have happened, he is now entitled to be considered as the assignee of the Government revenue payable in respect of the 10 *biswas*. His real claim is that the last assignee of this Government revenue was one Dalpat Rai, who died leaving a daughter *Musammat* Ram Piare. He claims that now he is entitled, as the heir of Dalpat Rai under Hindu Law, to have the same rights as Dalpat Rai enjoyed.

The Court below granted the plaintiff a decree declaring that he is entitled, by right of succession to Dalpat Rai as the *muafidar* or assignee of the Government revenue, to the revenue of the 10 *biswas* share in *mahals*.

The Secretary of State has appealed, and it is contended, *first*, that the Court below ought not to have entertained the suit because the plaintiff had not obtained the certificate referred to in sections 5 and 6 of Act XXIII of 1871; *secondly*, that the decree of the Court below is in contravention of the provisions of section 6 of the same Act; and *thirdly*, that the title which Dalpat Rai had, to be deemed the assignee of the Government revenue, came to an end with his lineal descendants.

The plaintiff submits that the provisions of sections 5 and 6 do not apply; *secondly*, that if it was necessary to obtain a certificate, he did in fact obtain one; and *thirdly*, that the decree of the Court below does not in any way contravene the provisions of section 6.

It appears that sometime after the year 1902 the plaintiff brought a suit in respect of a certain *zemindari* which belonged to Dalpat Rai. He succeeded then in establishing his title to the property he sued for. He did not in that suit include the Government revenue which he now claims. As a matter of fact he had already assigned it to third parties. A vendee from the plaintiffs also brought a suit in respect of some other *zemindari* which had at one time belonged to Dalpat Rai. In that case the Court dismissed the suit, on the ground that the then plaintiff had failed to prove that the present plaintiff was the reversioner to Dalpat Rai.

Section 4 of Act XXIII of 1871 is as follows:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted." Section 5, "Any person having a claim relating to any such pension or grant may prefer such claim...to the Collector of the District, or Deputy Commissioner, or other officer shall dispose of such claim in accordance with such rules as the Chief Revenue Authority may, subject to the general control of the Local Government, from time to time prescribe in this behalf." Section 6, "A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorised in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

The plaintiff seems to have procured a certificate, dated the 5th of November 1902, probably in connection with the previous suit to which we have already referred. This certificate will be found at page 7 of the respondent's book. The plaintiff contends that if the provisions of Act XXIII of 1871 applied to the present case, then the production of that certificate is a sufficient compliance with the provisions of section 6. The argument of the plaintiff that the provisions of section 6 of Act XXIII of 1871 do not apply to his case, is based on the decision of their Lordships of the Privy Council in the case of *Secretary of State for India* v. *J. Moment* (1). In that case it was held that certain provi-

(1) 18 Ind. Cas. 22; 40 C. 391; 13 M. L. T. 53; 17 C W. N. 169; (1913) M. W. N. 45; 15 Bom. L. R. 27; 11 A. L. J. 49; 17 C. L. J. 194; 6 Bur. L. T. 1; 24 M. L. J 459; 7 L. B. R. 10; 40 I. A. 48.

sions in the Burma Act (IV of 1898) were *ultra vires* in so far as it enacted that no Civil Court should have jurisdiction to determine any claim to any right over land as against the Government. Their Lordships referred to the Act of 1858 and to the Indian Councils Act of 1861. By section 65 of the Act of 1858 it was provided that, "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable, against the Secretary of State in Council for India as they could have done against the said Company." Their Lordships proceed as follows: "Their Lordships are of opinion that the effect of section 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company." On referring to Act XXIII of 1871 it will be found that until the passing of that Act there had been a Regulation in force, namely, XXIV of 1793, section 17 of which barred the jurisdiction of Civil Courts in a suit like the present. This section was repealed by Act XXIII of 1871. It would, therefore, seem that the East India Company could not have been sued at the time of the transfer of its powers and liabilities to the Crown. The case cited, therefore, does not apply to the present case. If the provisions of section 6 do apply, it was necessary that the plaintiff should produce the certificate specified in this section. It seems to us that the certificate which in fact was produced is not a compliance with the section. In the *first* place it is dated 1902, long before the present claim was contemplated. It was a certificate that the claim of Jwahir for *resumption of a muafi grant* might be tried by a Civil Court. At that time, there were rival claimants to the property of Dalpat Rai. The present suit is not a suit to establish the right of one of two rival claimants but is a suit against the Secretary of State in Council. *Furthermore*, it seems to us that we could not possibly make a decree declaring that the plaintiff was the assignee of the Government revenue without "making an order or a decree which would directly or indirectly affect the liability of Government to pay a grant of the Government revenue." The original *sanad* is not on the record. Such evidence as there is shows that it was a grant "*naslan bad naslan*", that is to say, "from generation to generation." It is not usual to make a grant of Government revenue by way of absolute grant, and if the grant was only made to the original grantee and his lineal descendants then the plaintiff has no claim. Admittedly he is not a lineal descendant. If on the other hand, it was a grant of the absolute interest, then the owner for the time being could do what he liked with the subject-matter of the grant. If the grant was of this nature, then the plaintiff by his own admission has alienated the revenue to third parties in which case he has no title. The plaintiff asks that in any event we should give him a declaration that he is the nearest reversioner to Dalpat Rai. The Court below has found that he is the nearest reversioner. As already pointed out, in one previous suit he satisfied the Court that he was the nearest reversioner. On the other hand, a vendee from him failed to prove in another Court that the plaintiff was the nearest reversioner of Dalpat Rai. The plaintiff says that a declaration of this kind may help him to come to a settlement with the Government. We do not feel called upon to decide the question, but at the same time we do not express any disagreement with the finding of the Court below. In our opinion we are precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay this revenue to the plaintiff. We, therefore, think upon all these grounds that the plaintiff's suit was misconceived and ought to have been dismissed.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's claim with costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 241 OF 1913.

March 9, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

BROJENDRA LALL DASS—DECREE-HOLDER—APPELLANT

versus

LAKSHMI NARAIN KHANNA AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *s.* 145, *scope of—Surety, when liable.*

Section 145 of the Code of Civil Procedure applies only where the surety has rendered himself personally liable for the decretal amount, and such liability can only be enforced against him to the extent to which he has become personally liable. [p. 149, col. 2.]

Appeal against the order of the District Judge, Burdwan, dated the 31st of March 1913.

Babus *Ram Chandra Mazumdar* and *Chandra Sekhar Banerjee*, for the Appellant.

Babus *Baidya Nath Dutt* and *Tarkeshwar Pal Chowdhury*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a udgment of the learned District Judge of Burdwan, dated the 31st March 1913, rejecting an application. The application that was before the learned Judge was an application under section 145, Code of Civil Procedure, for the execution of a decree against an alleged surety, Lakshmi Narain Khanna, by the sale of two Government promissory notes which, it is said, he had deposited as security for the decretal amount. The judgment-debtor is the son-in-law of the said Lakshmi Narain Khanna and a warrant for his arrest having been issued, Lakshmi Narain Khanna appeared before the first Munsif of Burdwan and threw on the table before him, according to the evidence, two Government promissory notes for Rs. 1,000 each, which he wished the Court to take as security for the decretal amount which had been found due against his son-in-law and to stay further proceedings in execution pending an application to set aside the *ex parte* decree. The learned Munsif refused to take the two Government promissory notes which had been so thrown upon the table of his Court, on the ground that no formal application had been made. Then what happened seems to be somewhat in dispute. It is said that Babu Sailendra Nath Mukerjee, who was the Pleader engaged by the decree-holder, took the Government promissory notes and put them into his pocket. The story told by Babu Sailendra Nath Mukerjee is that there was an arrangement between him and Lakshmi Narain Khanna that he should hold the two Government promissory notes as security for the due fulfilment of the decree. The decretal amount not having been paid, the present application was lodged. The litigation seems to have occupied a considerable time. The point, however, may be dealt with very shortly. Section 145, Code of Civil Procedure, applies only where the surety has rendered himself personally liable for the decretal amount. That is obvious because the section states so. *Secondly*, it would not be convenient to sell property in a suit that was not brought for that purpose. It is quite clear, therefore, that section 145 only applies where the surety has rendered himself personally liable for the decretal amount and such liability can only be enforced against him to the extent to which he has become personally liable. Accepting the story told by Babu Sailendra Nath Mukerjee, how does the case come under section 145, Code of Civil Procedure? According to the story told by Babu Sailendra Nath the agreement was that "we," that is the decree-holders, would execute the decree and realize the decretal amount by sale of the promissory note. 'Note' is obviously a mistake for 'notes.' Therefore, first of all it is to be seen whether Lakshmi Narain Khanna was a surety for the purpose of this decree. Clearly he did not acknowledge his personal liability. There was no contract of guarantee within the meaning of section 126 of the Indian Contract Act. All that he had done was that he deposited by way of security, or collateral security; if we accept Sailendra Babu's evidence, those two promissory notes were to remain as security for the amount due under the decree. That does not come within section 145. If the story is true, then Lakshmi Narain has only created an equitable charge upon the two Government promissory notes in favour of the decree-holder by depositing them in that manner to secure the amount due under the decree and, if that is the true arrangement,

as Sailendra Babu says it is, then that liability can only be enforced in a regular suit for the purpose of enforcing the charge that has been created by the deposit of the two Government promissory notes. The present proceedings have altogether been misconceived and I think the learned Judge of the Court below was quite right when he came to the conclusion that no contract, as provided by section 145 of the Code of Civil Procedure, had been established and that no personal liability having been undertaken by Lakshmi Narain Khanna his liability as mortgagor of these two Government promissory notes could not be enforced in an application under section 145, Code of Civil Procedure. I think the conclusion arrived at by the learned Judge of the Court below is right and the present appeal fails and must be dismissed with costs, two gold *mohurs*.

TEUNON, J.—I agree.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 526 OF 1914.

January 26, 1915.

Present:—Mr. Justice Shah Din.

FATEH CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

GANDA MAL—PLAINTIFF, AND ANOTHER—DEFENDANT—RESPONDENTS.

Punjab Pre-emption Act (*II of* 1905), *s.* 22 (2), *proviso, applicability of.*

The proviso to sub-section (2) of section 22 of Act II of 1905 is not applicable to a case, in which the price does not consist mainly of a debt greatly exceeding in amount the market-value of the property. [p. 150, col. 2.]

Second appeal from the decree of the Divisional Judge, Gujranwala Division at Lahore, dated the 30th October 1913, varying that of the Additional Judge, Gujranwala, datedthe 6th March 1912, decreeing the claim.

Mehta *Bahadur Chand*, for the Appellants.

Mr. *Bhagat Ram Puri*, for the Respondents.

JUDGMENT.—The facts are very fully stated in the judgment of the learned Divisional Judge. The plaintiff-respondent brought a suit against the defendants-appellants for possession by pre-emption of 126 *kanals* 18 *marlas* of land situate in *Mauza* Arup which had been sold by defendant No. 1, Fateh Singh, to defendants Nos. 2 and 3, Fateh Chand and Gurlal Singh, for Rs. 2,100. The Additional District Judge, in whose Court the suit was instituted, decreed the possession of the land in favour of the plaintiff conditional on payment of the whole consideration money, Rs. 2,100, but on appeal the learned Divisional Judge held that the proviso to sub-section (2), section 22 of the Punjab Pre-emption Act, II of 1905, was applicable to the case, and he found the market-value of the land Rs. 1,609 as the price of it for the purposes of the suit. He accordingly varied the decree of the Additional District Judge by reducing the amount payable by the plaintiff to the defendant-vendee from Rs. 2,100 to Rs. 1,609.

The questions for decision before me in this appeal are—(1) whether the proviso to sub-section (2) of section 22 of Act II of 1905 applies to this case and (2) whether, if t' e said proviso is not applicable, the price entered in the sale-deed was not fixed and paid in good faith, so that the plaintiff should have a right to take possession of the land on payment of the market-value.

Upon the *first* question the learned Counsel for the respondent has conceded that the proviso to section 22 of the Pre-emption Act is not applicable to the case, inasmuch as the price, Rs. 2,100, at which the sale purports to have taken place does not represent entirely or mainly a debt greatly exceeding in amount the market-value of the land sold. The debt which was due by the vendor to Mokand Lal, who made an assignment of it to the present vendees, amounted, as found by the Divisional Judge, to Rs. 1,491 and the market-value of the land has been held to be Rs. 1,609. It is, therefore, clear that the price entered in the sale deed did not consist mainly of a debt greatly exceeding in amount the market-value of the property, and the Divisional Judge was in error in applying to the case sub-section (2) of section 22 aforesaid.

Upon the *second* question, the plaintiff-respondent's Counsel has urged that since the vendees had purchased the debt, due by the vendor to Mokand Lal and which amounted

to Rs. 1,491 for Rs. 1,052, (the Divisional Judge is wrong in saying that the amount of the purchase-money was only Rs. 1,000), the price entered in the sale-deed was not fixed and paid in good faith, and that, therefore, his client is entitled to possession of the land on payment of its market-value.

This argument is clearly fallacious. At the date of the sale the vendor owed Mokand Lal a debt amounting to Rs. 1,491 and although the vendees had a few days previously purchased that debt from Mokand Lal for Rs. 1,052, yet the amount due to them by the vendor was Rs. 1,491 and they could recover that amount from him by execution of the decree on the basis of which the said amount was due to Mokand Lal. Therefore as between the vendor and the vendees the amount of the debt due by the former to the latter was not Rs. 1,052 but the full amount of Rs. 1,491, and since it has been held by the Divisional Judge that the rest of the consideration money entered in the sale-deed was actually paid, the conclusion is irresistible that the price at which the sale purports to have taken place was fixed and paid in good faith. In fact, as the Divisional Judge has applied the proviso to sub-section (2) of section 22 aforesaid to this case, he has, by necessary implication, found that the price was paid and fixed in good faith as between the vendor and the vendees, for it is only upon that finding that the proviso in question would come into operation.

For the foregoing reasons, I hold that the decision of the Additional District Judge was correct and I accordingly accept this appeal, and reversing the decree of the Divisional Judge, restore that of the Additional District Judge. The plaintiff-respondent will pay the costs of the defendants-appellants both in this Court and in the Divisional Court. The plaintiff must pay into Court the amount required to make up the full price, Rs. 2,100, on or before the 26th March 1915, failing which his suit shall stand dismissed with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 31 OF 1914.

March 8, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

T. R. GOPALASAMI PILLAI—PETITIONER—APPELLANT

versus

SI. RU. PE. KA. CHIDAMBARAM—RESPONDENT.

Contract Act (IX of 1872), s. 56—Sub-contract—Principal contract, cancellation of—Effect on sub-contract.

Where a sub-contract postulates the existence of a principal contract for its operation and continuance, the cancellation of the latter terminates the former also. [p. 152, col. 1].

Inder Pershad Singh v. *Campbell*, 7 C. 474; 8 C. L. R. 501; *Goculdas Madhavji* v. *Narsu Venkuji*, 13 B. 630, followed.

Appeal, under clause 15 of the Letters Patent, against the judgment, dated the 19th December 1913, of the Hon'ble Mr. Justice Spencer, in Civil Revision Petition No. 375 of 1912, preferred against the decree of the Court of the Subordinate Judge of Madura, in Small Cause Suit No. 3036 of 1911.

FACTS.—One Solai Kudumban obtained a contract from Government to build a hospital at Dindigul. He appointed the defendant his agent to execute the said work with full powers of enforcing the contract with the Executive Engineer, Public Works Department. The defendant appointed the plaintiff his representative and agent to be in charge of and to supervise and conduct the further construction and completion of the said building and agreed to pay him Rs. 300 for the services to be rendered. After some work was done, the Government refused to recognise the agency of the defendant and cancelled the contract. The work had to be stopped in consequence. The plaintiff having been paid Rs. 122-10-0 out of the Rs. 300 promised, he instituted the present suit to recover the balance from the defendant. The Subordinate Judge of Madura dismissed the suit and the dismissal was upheld by Spencer, J., in Civil Revision Petition No. 374 of 1912. Against this latter order, the plaintiff preferred this appeal under the Letters Patent.

Mr. *S. Muthia Mudaliar*, for the Appellant:—The plaintiff having done all that he was bound to do under the contract

and the performance having been prevented by no act of his, the defendant was bound to pay the stipulated sum, *Rustomji* v. *Sheth Purshotamdas* (1) and *Fani Bhusan Roy Chowdhry* v. *Bama Sundari Debi* (2).

Mr. *V. Purushottama Iyer*, for the Respondent:—The liability to pay was dependent upon the continuance of the original contract and that having been put an end to by the Government, the subordinate contract of agency also came to an end. *Goculdas Madhavji* v. *Narsu Yenkuji* (3) and *Inder Pershad Singh* v. *Campbell* (4).

JUDGMENT.—The learned Judge is right. *Inder Pershad Singh* v. *Campbell* (4) and *Goculdas Madhavji* v. *Narsu Yenkuji* (3) show that where a sub-lease is entered into in the belief that the original contract will be subsisting during the period during which the sub-contract is to be worked, the cancellation of the contract terminates the sub-contract as well: we think that proposition is unobjectionable. The plaintiff has recovered on the principle of *quantum meruit* for what he has done. The suit was rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 25 B. 606; 3 Bom. L. R. 227.
(2) 4 C. W. N. 343.
(3) 13 B. 630.
(4) 7 C. 474; 8 C. L. R. 501.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 1374 OF 1914.
January 26, 1915.
Present:—Mr. Justice Shah Din.
BAHADUR KHAN—JUDGMENT-DEBTOR—APPELLANT
versus
VIROO MAL—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XXI, r.* 37 (1)—*Execution of decree—Arrest of judgment-debtor, when may be ordered.*

A decree-holder is not justified in applying for the arrest of the judgment-debtor in the first instance, without trying to obtain execution of the decree by other means available to him, *i. e.*, by the attachment and sale of his property other than land.

First appeal from an order of the District Judge, Multan, dated the 22nd of May 1914, ordering arrest of the judgment-debtor in execution of decree.

Bakhshi *Tek Chand*, for the Appellant.
Mehta *Bahadur Chand*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed in the course of execution proceedings and is connected with Civil Appeal No. 602 of 1914. The respondent, decree-holder, had applied in the Court of the District Judge for execution of his decree by the arrest of the appellant, judgment-debtor, and the District Judge allowed the appellant fifteen days' time to arrange for the farm of his land in favour of the respondent, failing which a warrant for the arrest of the appellant was to issue. I think that the respondent was not justified in applying for the arrest of the appellant in the first instance, without trying to obtain execution of the decree by other means available to him, *i. e.*, by the attachment and sale of the appellant's property other than land. The District Judge too was wrong in ordering the arrest of the appellant if he did not settle with the respondent about the lease of his land to him within fifteen days. The time allowed was so short that it was impracticable for the appellant to make satisfactory arrangements for the farm of his land to the respondent.

I accept this appeal and set aside the order of the District Judge for the arrest of the appellant. The respondent, can, if so advised, make a fresh application for execution. The appellant's costs will be borne by the respondent. Counsel's fee Rs. 16.

Appeal accepted.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1515 OF 1913.
March 27, 1915.
Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.
KUNNU MAL—DEFENDANT—APPELLANT
versus
TARA CHAND AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Mortgage of family property—Liability of sons and grandsons—Legal necessity.

The sons and grandsons of a Hindu mortgagor mortgaging the family property are not bound under the mortgage in respect of that part of the consideration, which was paid in cash at the registration office but not required for legal necessity. [p. 153, col. 2.]

KUNNU MAL v. TARA CHAND.

Second appeal from the decision of the Additional Judge, Aligarh, dated the 21st of July 1913.

Mr. *Durga Charan Banerji*, for the Appellant.

Mr. *Lakshmi Narain*, for the Respondents.

JUDGMENT.—These are two connected appeals in which substantially similar questions were litigated. The suits were brought in one case by the sons and grandsons, and in another case by the sons only, of one Chhittar Mal. In the suit out of which this appeal, No. 1515 of 1913, arises, the plaintiffs were the sons and grandsons. The relief sought was a declaration that certain alienations of joint family property were not binding on the plaintiffs. There was a considerable array of defendants, of whom only one, Kannu Mal has contested the matter in second appeal before this Court. We are concerned, therefore, with the findings arrived at in the Courts below regarding two mortgage-deeds in favour of Kannu Mal, one dated the 30th March 1904 and one dated the 9th of January 1906. The consideration for these bonds has been analysed by the learned Subordinate Judge who tried the suit in the first instance. He has come to the conclusion that part of the consideration for each of these bonds was due on account of antecedent debt and is binding on the sons and grandsons. In the case of each of these bonds part of the consideration was paid in cash at registration. The finding of the first Court, which has been affirmed by the lower Appellate Court, is to the effect that it has not been shown that this money was borrowed for any such legal necessity as to make the alienation binding on the sons. On these findings the plaintiffs have been given a decree that each of these bonds is binding on them only to the extent of the antecedent debt. Coming to this Court in second appeal Kannu Mal has raised various points. One of these is as to a finding of fact with regard to the question, whether a certain award and a decree passed in accordance with the same had been actually acted upon. If the decision of the Courts below on this point were wrong, it is possible that a question of limitation might arise; but we see no reason for holding that the finding to the effect that this award has been shown to have been acted upon, should be interfered with by us. Two other pleas of a technical nature have been raised, one as to the effect of the provisions of section 41 of the Transfer of Property Act, IV of 1882, on the position of the parties, and the other is as to whether the filing of these two suits does not contravene the provisions of Order II, rule, 2, of the Code of Civil Procedure. We are content to say that we find no force in these pleas. The latter has been more particularly dealt with by the lower Appellate Court and we agree with the view taken by the learned District Judge on the point. The substantial plea taken is that the Courts below have not considered the question, whether the money advanced at registration in respect of each of the two bonds in favour of Kannu Mal might not constitute a debt binding upon the sons, in view of their pious duty to satisfy their father's debts not tainted with immorality. We cannot find that there was any plea to this effect taken in the Courts below, and naturally no such plea having been taken there has been no inquiry as to whether the debt in question could or could not be said to be tainted with immorality. We think, however, that the point does not really arise in a suit like the present and that it was rightly passed over in the Courts below. It might arise in the event of Kannu Mal's obtaining a simple money decree on his bonds and seeking to enforce the same against the ancestral property. What the sons and grandsons are now contesting is the alienation; that is to say, the question raised is whether the mortgage of the family property as such is binding upon these plaintiffs in respect of those sums which were advanced cash down as consideration for the two mortgages. In the present state of authority in this Court, we think this question must be answered in the negative. The appeal, therefore, fails and we dismiss it with costs, including fees on the higher scale.

The questions raised in the connected Second Appeal No. 1516 of 1913 are substantially identical, and that appeal must also fail.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1520 OF 1913.

February 4, 19 5.

Present:—Mr. Justice Scott-Smith.

LAJJA RAM—PLAINTIFF—APPELLANT

versus

FAQIRA—DEFENDANT—RESPONDENT.

Easement—Custom—Privacy—Windows interfering with privacy—Injunction.

A plaintiff is entitled to have a decree closing doors and windows opened by his neighbour, by obtaining an injunction from the Court on the ground that his privacy has been interfered with and by custom he is entitled to restrain the defendant from interfering with his privacy by opening new windows and ventilators.

Second appeal from the decree of the Divisional Judge, Ambala, dated the 19th April 1913, reversing that of the Munsif, first Class, Karnal, dated the 15th June 1912, decreeing the claim.

Mr. *Nand Lal*, for the Appellant.

Bakhshi *Gokal Chand*, for the Respondent.

JUDGMENT.—In the suit out of which the present appeal arises the plaintiff asked for a perpetual injunction against the defendant, to the effect that he should close certain windows which he had made in his house and should not open any windows or ventilators towards the plaintiff's house on the ground that the opening of such interfered with the plaintiff's privacy. The defendant raised a plea as to plaintiff's ownership of the house occupied by him, but both the Courts have decided this point in plaintiff's favour. The first Court, after recording evidence and viewing the spot, held that plaintiff's privacy had been interfered with and granted him the injunction asked for. The Divisional Judge set aside the order of the first Court, apparently on the ground that plaintiff had not proved any custom entitling him to such an injunction and that the most reasonable course to adopt was to leave the plaintiff to protect by building a wall up against the offending windows and within his own property. In support of its view the lower Appellate Court cited a ruling reported as *Chabildas Lallubhai* v. *Municipal Commissioner, Bombay* (1). In that case where a window opened by the defendant commanded a view, not of the plaintiff's private apartments, but of an open courtyard outside his house, it was held that there had been no invasion of the plaintiff's privacy which would entitle him to have the window closed, according to the custom legally recognized in Gujrat. That case was decided according to custom prevalent in a distant part of the country and it does not appear to me to be an authority in point in the present case. The lower Appellate Court appears to have set up a defence which was never pleaded by the defendant in the first Court. Neither in his written statement, nor when examined orally, did the defendant say anything about the claim being contrary to custom.

Under the circumstances, I think the case should not have been decided upon the ground put forward by the lower Appellate Court. The plaintiff's witnesses state that his privacy has been interfered with by the windows in question, but there is no serious contention that it has not been interfered with and the Judge of the first Court who went to the spot says that it has been interfered with. In my opinion the plaintiff is clearly entitled to the relief asked for. I accept the appeal, and setting aside the order of the lower Appellate Court restore the decree of the first Court with costs throughout.

Appeal accepted.

(1) 8 B. H. C. R. 85.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 332 OF 1914.

February 16, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

KALAYI NARAYANA JOGITHAYA—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF SOUTH CANARA—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 35—Survey records, entry of measurement of survey fields in, admissibility of, to prove encroachment - Title, proof of.

Entries of the extents of the survey fields made in survey registers are admissible under section 35 of the Evidence Act to prove an encroachment, though insufficient to prove title to the extent encroached upon. [p. 155, col. 2.]

Sankaran Numbudripad v. *Manavikraman*, 10 Ind. Cas. 653; 9 M. L. T. 415; (1911) 1 M. W. N. 213; *Krishna Aiyar* v. *Secretary of State for India in Council*, 5 Ind. Cas. 121; 33 M. 173 at p. 175; 6 M. L. T. 306; 20 M. L. J. 71, *Venkatarama Aiyar* v *Secretary of State for India in Council*, 5 Ind. Cas. 118; 33 M. 362 at p. 364; 7 M. L. T. 139; 20 M. L. J. 74, distinguished.

Second appeal against the decrees of the District Court of South Canara, in Appeal Suits Nos. 507 and 517 of 1911, preferred against those of the District Munsif of Puttur, in Original Suit No. 403 of 1910.

FACTS.—The only point involved in the second appeal was whether the District Judge was right in relying upon entries in survey records in deciding whether the disputed plot was encroached upon or not.

Mr. *B. Sitarama Rao*, for the Appellant:—The entries in survey records are quite insufficient to prove the character of the land, whether *poramboke* or not: *Krishna Aiyar* v. *Secretary of State for India in Council* (1) and *Venkatarama Aiyar* v. *Secretary of State for India in Council* (2).

The *Government Pleader*, for the Respondent:—The cases cited have no application. Entires in survey records have been admitted as valuable evidence. *Sankaran Numbudripad* v. *Manavikraman* (3). The two cases in 33 Madras do not go the length of deciding that the entries are inadmissible even to prove the extent of *poramboke*, and it is for that purpose alone that the District Judge has admitted the evidence.

JUDGMENT.—The District Judge has found, as a fact, that the plaint plots are encroachments on *poramboke*. The appellant's Vakil seeks to attack this finding on the ground that it is based on evidence which is legally insufficient, *i. e.*, on the entries and measurements in the survey records. It is not denied that this is relevant evidence under section 35 of the Indian Evidence Act and it has in many cases been relied onas valuable [Vide *Sankaran Numbudripad* v. *Manavikraman* (3)]. The appellant relies on the dicta in *Krishna Aiyar* v. *Secretary of State for India in Council* (1) and *Venkatarama Aiyar* v. *Secretary of State for India in Council* (2). "This (classification of the items as *nattam poramboke*) at the utmost was an assertion of title, and is not by itself sufficient to prove the title of the defendant:" *Krishna Aiyar* v. *Secretary of State for India in Council* (1). "Such entry (of a disputed tank in *pymash* and settlement registers as Government *poramboke*) is, of course, insufficient to prove that the tank is, in fact, the property of Government:" *Venkatarama Aiyar* v. *Secretary of State for India in Council* (2). We doubt whether the learned Judges in either case meant to lay down a rule of law as to the quantum of evidence requisite to prove a question of fact. But apart from this the cases are quite distinguishable.

In each reported case the learned Judges were considering to what extent the description of a particular piece of land or a tank in a Government register as *poramboke* should be accepted as proof that the land or tank was really *poramboke*. Here the question is different. It is not disputed that a "*todu*" has been in existence from time immemorial and is Government *poramboke*. The question is how far it extends: and in determining this the District Judge has relied on the records of and measurements taken by the Survey Department in the course of their ordinary official duties as evidence of the extent of the *poramboke* at the time of the survey. This he is entitled to do: and it is not within our province, sitting as Judges in second appeal, to determine whether it should be accepted as sufficient, or what weight on the other side should be given to the appearance of the ground at the time of suit or the existence of trees relied on by the appellant.

The second appeal must be dismissed with costs.

Appeal dismissed.

(1) 5 Ind. Cas. 121; 33 M. 173 at p. 175; 6 M. L. T. 306; 20 M. L. J. 71.

(2) 5 Ind. Cas. 118; 33 M. 362 at p. 364; 7 M. L. T. 139; 20 M. L. J. 74.

(3) 10 Ind. Cas. 653; (1911) 1 M. W. N. 213; 9 M. L. T. 415.

CALCUTTA HIGH COURT.

FIRST CIVIL APPEAL No. 409 OF 1910.

July 31, 1914.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Walmsley.

Rani AMRITA SUNDARI DEBI CHOWDHURANI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Munshi SHERAJUDDIN AHAMED CHOWDHURY AND OTHERS—PLAINTIFFS AND DEFENDANT—RESPONDENTS.

Chur *land formed in bed of river—Consent decree, nature of, how far binding—Consent decree and compromise, compared—Contract of parties, nature of—Head of family, decree against, how far binding—Map drawn for a different purpose, how far affects rights of property—Survey map and* thak *map distinguished—Submerged lands, possession of, presumption of—Limitation—Adverse possession—Constructive possession does not apply to a wrong-doer.*

A consent decree is just as binding on the parties thereto as a decree after a contentious trial. [p. 159, col. 2.]

In re South American and Mexican Co., (1895) 1 Ch. 37; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 31, *The Bellcairn*, (1885) 10 P. D. 161; 55 L. J. Adm. 3; 53 L. T. 686; 34 W. R. 55; 5 Asp. M. C. 503; *Nicholas* v. *Asphar*, 24 C. 216; *Raj Lakshmi Dassee* v. *Katyayani Dassee*, 12 Ind. Cas. 464; 38 C. 639 at p. 674, referred to.

A consent decree cannot have greater validity than the compromise itself. [p. 160, col. 1.]

Huddersfield Banking Co. v. *Lister*, (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567, referred to.

A consent order is only an order of the Court carrying out the agreement between the parties. [p. 160, col. 1.]

Rajlakshmi v. *Katyayani Dassee*, 12 Ind. Cas. 464; 38 C. 639 at p. 674; *Kshetra Moni Dasi* v. *Amodini Dasi*, 16 Ind. Cas. 611, referred to.

A contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge. [p. 160, col. 1.]

Wentworth v. *Bullen*, 9 L. J. (o. s.) K. B. 33, 9 B. & C. 840; 33 R. R. 353; 109 E. R. 313; *Keshab Panda* v. *Bhobani Panda*, 21 Ind. Cas. 538; 18 C. L. J. 187, referred to.

A decree obtained against the head of a family in a suit to which the other members are not parties may be operative against the latter under certain circumstances; but this principle clearly does not apply unless it is shown that the matter was one in which the member sued was entitled to represent the whole family. [p. 162, col. 2.]

Jogendra Deb v. *Funindro Deb*, 14 M. I. A. 367 at p. 376; 11 B.L.R. 244; 17 W. R. 104; 2 Suth. P. C. J. 517; 3 Sar P.C.J. 32; 20 E.R. 824; *Narayanaswamy Naidu Garu* v. *Tirumalasetti*, 16 Ind. Cas. 698; (1913) M. W. N. 96; 24 M. L. J. 79 at p. 83; *Jaddo Kuar* v. *Sheo Shankar*, 7 Ind Cas. 902; 7 A. L. J. 945; 33 A. 71, affirmed by the Judicial Committee in *Sheo Shankar Ram* v. *Jaddo Kunwar*, 24 Ind. Cas. 504; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1173; 16 Bom. L. R. 810; 18 C. W. N. 968, *Kishen Parshad* v. *Har Narain Singh*, 9 Ind. Cas. 739; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; 38 I. A. 45; 33 A. 272; (1911) 2 M. W. N. 395 and *Kunj Behari* v. *Kandh Prashad*, 6 C. L. J. 362 at p. 368, referred to.

The rights of property as between two parties cannot be affected by a map drawn for a different purpose, a purpose not relevant to the subject of the dispute between them. [p. 163, col. 2.]

Kerr v. *Nuzzar Mahomed*, 2 W. R. (P. C.) 28 and *Moni Roy* v. *Rajbanshi Kooer*, 25 W. R. 393, referred to.

Although the survey officers have at their disposal means of more accurate measurement than the *thak* officers have, yet no hard and fast rule can be laid down that a survey map is more reliable than a *thak* map. The true principle is that the map which more clearly agrees with the local land-marks, is the one that should be followed. [p. 164, col. 2.]

Abid Hossein Mandul v. *Dowcurry Pal*, 6 C. W. N. 629 and *Nawab Bahadur of Murshidabad* v. *Gopinath*, 6 Ind. Cas. 392; 13 C. L. J. 625 at p. 632, referred to.

The rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, the only point for investigation in such cases is the period of time when the lands re-appeared and became fit for occupation. [p. 165, col. 1.]

Secretary of State v. *Krishnamoni Gupta*, 6 C. W. N. 617; 29 C. 518 (P.C.); 4 Bom. L. R. 537; 29 I. A. 518, referred to and followed.

Where it is found that the possession of the defendants, after re-formation of the disputed lands, has not extended over the statutory period, the claim of the plaintiffs is not barred by limitation in respect of lands which lie within the *thak* boundaries of the *churs*. [p. 165, col. 2.]

The theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession. [p. 165, col. 2.]

Mohini Mohan v. *Promada Nath*, 24 C. 256; 1 C. W. N. 304 and *Jogendra Nath Roy* v. *Baladeo Das Marwari*, 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127, referred to.

Appeal against the decree of the Additional Subordinate Judge, Faridpur, dated the 25th April 1910.

Dr. *Rash Behary Ghose*, Babus *Dwarka Nath Chakravarti*, *Biraj Mohan Majumdar*, *Satish Chandra Bhattacharya* and *Jatindra Narain Chowdhury*, for the Defendants-Appellants.

Mr. *S. P. Sinha*, Babus *Tara Kishore Chowdhury*, *Troylokya Nath Ghose* and *Surendra Nath Das Gupta*, for the Plaintiffs-Respondents.

Babu *Joges Chandra Roy* for the Defendant-Respondent.

JUDGMENT.—The subject-matter of the litigation, which has resulted in this appeal, consists of a large tract of land, included in a *chur* formed in the bed of the river Ganges, called also Kirti Nasha, in the District of Faridpur. The land is described in the plaint as comprised within three sets of boundaries which constitute three distinct parcels *ka*, *kha*, *ga*. The areas of the parcels were stated approximately in the plaint as 10 *kanis* (=90 *bighas*), 3 *drones* (=432 *bighas*), and $15\frac{1}{2}$ *drones* (=2232 *bighas*) respectively. On measurement, however, the aggregate area of the first two parcels has turned out to be 347 *bighas*, and the area of the third plot 4221 *bighas*. The case for the plaintiffs is that the disputed lands are included in estate No. 5603 of the Faridpur Collectorate, held in *patni* by them under the proprietors. They allege that the lands are partly re-formation on the site of, and partly accretion to three *mouzas* Bhaga Chur, Chur Datali, and Chur Lasti also called Chur Bhaga. The *churs* were measured in the course of *thak* proceedings in the year 1859 and were subsequently measured by way of survey during the following year. The plaintiffs further assert that in 1879, as a consequence of a dispute about the possession of some of the lands of these *churs*, a suit was instituted by their predecessors-in-interest against persons now represented by the defendants. In the course of this litigation, it is said, the lands were measured, and a decree made by consent of parties. The plaintiffs found their title to the disputed lands on the *thak* map of 1859, the survey map of 1860 and the consent decree in the suit of 1879. The immediate occasion for the institution of this suit is stated to be a dispute as to the possession of the land which culminated in a proceeding under section 145 of the Criminal Procedure Code. The dispute related to plots *ka* and *kha* and an intervening strip of land. The Magistrate held, on the 8th March 1905, with regard to plots *ka* and *kha* that neither of the disputants was in possession, and accordingly made an order for attachment under section 146 of the Criminal Procedure Code. As regards plot *ga*, the plaintiffs allege that the defendants wrongfully took possession of it on its re-appearance in 1899 after diluvion. The plaintiffs on these allegations pray for declaration of their title to the disputed lands by way of re-formation on the original site of, and contiguous accretion to, the three *mouzas* Bhaga Chur, Chur Datali and Chur Lastias comprised within the *thak* and survey boundary lines, and within the lines of the decree in the suit of 1879; the plaintiffs also claim title by adverse possession for the statutory period. They seek to recover possession by ejectment of the defendants as trespassers and claim mesne profits as also the sum in the custody of the Collector as the surplus profits of the land attached by the Magistrate. The defendants resist the claim, on the ground that the plaintiffs have no title in the disputed lands, and that, if they had any title, it has been extinguished by operation of the law of limitation. The defendants may be grouped into two classes: one set claims part of the lands as included in *mauza* Nemua, also called Sakhipura, which appertains to estates No. 9964-67; the other set claims a portion of the lands as included within *mouza* Tarabunia comprised in estate No. 9670. The proprietors of Sakhipura also repudiate the consent decree in the litigation of 1879 as not conclusive upon the question now in controversy. The Subordinate Judge has, upon an examination of the voluminous evidence on record, both oral and documentary, decreed the claim in part. He has found in substance that the *thak* line has not been correctly delineated by the *amin* and cannot consequently be made the foundation for a decree; he has also found that the survey line has been correctly delineated by the *amin* and was inaccurately relaid on the map prepared in the suit of 1879; but he has held that the parties are bound by the delineation of the boundary on that map to the extent it goes. The Subordinate Judge has accordingly, taken as the boundary of the *mouzas* claimed by the plaintiffs, a composite line consisting partly of the survey boundary, partly of the boundary line on the map in the suit of 1879 and—these two lines are not conterminous partly also of an imaginary line drawn from east to west to connect their ends. In this view the Subordinate Judge has dismissed the claim for plot *ka*, has decreed to the plaintiffs 213 *bighas*, 15 *cottahs* out of plot *kha* and 1905 *bighas*, $12\frac{1}{2}$ *cottahs* out of plot *ga*. It may be added that the suit has failed in respect of all lands claimed by the pro-

prietors of Tarabunia as included within their estate. The defendants, proprietors of Sakhipura and claimants under them, have appealed to this Court. On their behalf, the decree of the Subordinate Judge has been attacked. on the ground that the plaintiffs are entitled at least to all lands included within the lines of the *thak* survey of Bhaga Chur, Chur Datali and Chur Lasti or Chur Bhaga. It has further been argued that the claim is barred by limitation in respect of all lands situated beyond the *thak* boundaries of these villages, even if the plaintiffs are able to establish a title thereto. The plaintiffs-respondents, the proprietors of Bhaga Chur, have preferred a cross-appeal which is directed both against the appellants, the proprietors of Sakhipura, and the respondents, the proprietors of Tarabunia. The objections in support of the cross-appeal against these two sets of persons are based on distinct grounds; against the proprietors of Sakhipura, it has been urged that the plaintiffs are entitled to more lands than what have been decreed to them as included within Bhaga Chur; as against the proprietors of Tarabunia it has been argued that the plaintiffs have acquired a good title by adverse possession. On these arguments, two questions emerge for consideration, *viz.*, those of title and possession. As regards the question of title, the points which require examination may be formulated as follows:—*viz.*, *first*, does the map prepared in the litigation of 1879 conclude the controversy in this suit either entirely or partially; *secondly*, is this question be answered in the negative, should a decree be made on the basis of the *thak* map as delineated on the case map in the present suit; and *thirdly*, if the point last mentioned be not answered in the affirmative, should a decree be made on the basis of the lines of the survey map as reproduced on the case map? It is plain that the substantial question in controversy relates to the scope of the suit of 1879, and the effect of the decision therein upon the points now in dispute, and we shall first examine the elaborate arguments which have been addressed to us on this part of the case; but for the correct appreciation of the points raised, it is essential to give a brief outline of the antecedent dispute between the parties regarding the subject-matter of this litigation.

In 1859, the officers in charge of the *thak* proceedings measured the lands comprised in Chur Bhaga, Chur Datali, Chur Lasti, Chur Sakhipura and Chur Tarabunia. In the following year, the lards were remeasured and fresh maps prepared by the survey authorities. The parties were then in controversy as to a large tract, 16 *d odes* or 2,300 *bighas* in area, which was shown by the *thak* authorities as situated within Sakhipura. Two suits were thereupon instituted in respect of this land, one on the 1st August 1863 by a lessee under the proprietors of Chur Bhaga, the other on the 13th January 1864 by the proprietors of Chur Sakhipura. The plaintiff in the former case prayed for a declaration that the lands had been erroneously held by the Board of Revenue on the 3rd August 1860 to be included within Sakhipura, and that they were really included in Chur Bhaga; he asked accordingly that his possession therein might be confirmed. In the second suit the plaintiffs prayed for a declaration that in a possessory suit under Act IV of 1840, decided on the 31st January 1861 by the primary Court and on the 21st March 1861 by the Court of Appeal, the then defendants had been erroneously held to be in possession of those lands and that consequently they might be ejected therefrom. An endeavour has been made, in the present litigation, to locate the lands then in dispute, but the attempt has proved fruitless. This much can be affirmed with some approach to certainty that the lands were situated towards the southern part of what is known as Chur Bhaga, but the northern boundary of the disputed plot cannot be located. The reason for this is obvious: the tract has been more than once swept away completely by the action of the river, and it is not practicable to identify the places mentioned in the boundaries as given in the schedules to the two plaints. The northern boundary as given in the plaint of the suit instituted on the 1st August 1863 by Kali Kishore Chatterjee, then lessee from the proprietors of Chur Bhaga under whom the plaintiffs claim, is obviously too vague to admit of identi-

fication. The northern boundary as given in the plaint of the suit instituted on the 13th January 1864 by the proprietors of Sakhipura, the predecessors of the defendants, is more precise, but is of no greater use for purposes of identification. There is no reliable evidence as to the northern boundary of Shajanpur mentioned therein. We know nothing about the size and situation of Shajanpur in 1863. We are not unmindful that a Shajanpur is mentioned in Exhibit 67 prepared in 1878 when the lands had re-formed after deluvion; but it cannot safely be assumed that what is called Shajanpur in the map of 1878 is identical in size and situation with the village of that name mentioned in the plaint of the 13th January 1864. Even if the identity were assumed, however, it would be of no assistance, for the obvious reason that the map does not show the boundaries of Shajanpur; we have nothing beyond the name on the map of 1878. We must hold accordingly that the northern boundary of the lands in dispute in the cross suits of 1863 and 1864 cannot now be definitely located. There is this additional difficulty that as the area of the disputed land covered only about one-seventh of Chur Bhaga, it cannot be located in the absence of information as to the precise position of the northern boundary of the disputed plot; so that we must proceed only on the basis that the lands were situated in the southern portion of Chur Bhaga. The suits were tried together in the Court of first instance, and on the 19th September 1864 the Principal Sadar Amin decided in favour of the lessee under the proprietors of Chur Bhaga. On appeal, this decision was reversed by the District Judge on the 10th June 865. He held in substance in favour of the proprietors of Sakhipura that the boundaries had been correctly determined by the *thak* authorities, and directed that they be restored to possession. There is no tangible evidence on the record to show the course of events after the termination of these litigations, in which the correctness of the boundary, as determined by the *thak* authorities, was directly challenged and ultimately upheld. The lands, it appears from the evidence, were washed away and were re-formed, and in 1879 another litigation commenced between the parties. The nature and scope of the dispute, if any, immediately antecedent to the institution of that suit do not transpire from the evidence on the record, though the plaint refers to a possessory order by the Criminal Court on the 31st May 1876 and also mentions other disputes. The suit was instituted by the present plaintiffs or their predecessors for recovery of possession of $8\frac{1}{2}$ *drones* or 1,224 *bighas* of *chur* land, alleged to be situated in Chur Bhaga, as also of a share of Chur Sakhipura (Exhibit 17). The claim was made against defendants, who along with other persons are defendants in the present litigation. The suit was commenced on the 5th March 1879 and a decree was made, apparently by consent of parties, on the 4th June 1880. As a result of this compromise, the then plaintiffs recovered 4 *kanis* of land, *i.e.*, 1/34th of the total quantity of lands claimed in the plaint. The compromise was based on a private map prepared by an *amin* other than the *amin* appointed by the Court to survey the locality. This map depicts a portion of the boundary between the villages Chur Bhaga and Chur Sakhipura; but the map gives no indication whatever as to the position either of the disputed lands ($8\frac{1}{2}$ *drones* in area) or of the lands decreed (4 *kanis* in area). The plaintiffs in this case have made a strenuous endeavour to support the conclusion that the boundary between Chur Bhaga and Chur Sakhipura, as demarcated in that suit, is conclusive between the parties, while the defendants have attacked the validity of the compromise and the decree based thereon on a variety of grounds. Before these grounds of attack are examined, two propositions may be treated as incontestable. In the *firsts* place, there is high authority for the proposition that a consent decree is just as binding on the parties thereto as a decree after a contentious trial: *In re South American and Mexican Co.* (1), *The Bellcairn* (2), *Nicholas* v. *Asphar* (3), *Rajlakshmi Dassee* v. *Katyayani Dassee* (4). In the *second* place, it

(1) (1895) 1 Ch. 37; 64 L. J. Ch. 189; 12 R. 1; 71 L. T. 594; 43 W. R. 131.

(2) (1885) 10 P. D. 161; 55 L. J. Adm. 3; 53 L. T. 686; 34 W R. 55; 5 Asp. M. C. 503.

(3) 24 C 216.

(4) 12 Ind. Cas. 464; 38 C. 639 at p. 674.

is equally well settled that a consent decree cannot have greater validity than the compromise itself. As was observed by the Court of Appeal in *Huddersfield Banking Co.* v. *Lister* (5), the real truth of the matter is that a consent order is a mere creature of the agreement, and that if greater sanctity were attributed to it than to the original agreement itself, it would be to give the branch an existence which is independent of the tree. To use the language of Kay, L. J., the consent order is only the order of the Court carrying out the agreement between the parties: *Rajlakshmi* v. *Katyayani* (4), *Kshetra Moni Dasi* v. *Amodini Dasi* (6), conversely, as was said in *Wentworth* v. *Bullen* (7), the contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of the Judge. *Keshab Panda* v. *Bhobani Panda* (8). The consent decree of the 4th June 1880 has consequently as much validity as and no greater validity than the agreement, if any, between the parties to which it purports to give effect. The appellants, the proprietors of Sakhipura, have denied that the decree in the suit of 1879 concludes the controversy in this litigation on five substantial grounds, namely, *first*, that the litigation was not *bona fide*; *secondly*, that the settlement was not made with the authority of the Sakhipura proprietors; *thirdly*, that all the parties to the present suit were not parties to the earlier suit and are not bound by the compromise; *fourthly*, that the compromise decree has not been recognised and acted upon; and *fifthly*, that no question of settlement of the boundary between Bhaga and Sakhipura fell within the scope of that suit and none was determined by the decree made therein.

In support of the first of these objections, reference has been made to the proceedings in the suit of 1879, and the execution of the decree made therein. The plaint was filed on the 14th March 1879, as appears from the order sheet in the suit (Exhibit 83). On what date the proprietors of Sakhipura, who were some of the defendants, entered appearance, cannot be determined from the materials on the records; but that some of the defendants must have entered appearance on or before the 15th April 1879, is shown by the fact that on that date the suit was adjourned for compromise on the application of both sides. This circumstance is a matter for legitimate comment. If there was a real dispute between the parties, which had culminated in the institution of the suit by the plaintiffs, it is hardly probable that the parties would forthwith negotiate for a settlement, specially when we find, as will presently appear, that the claim was grossly exaggerated and rested on no solid foundation. On the 16th May 1879, the case was again adjourned for compromise, though up to this stage no written statement had been filed by any of the defendants. On the 16th June 1879, the defendants filed their written statement (Exhibit 22) in which mention was made of the proposal for compromise, and the failure of the parties to effect a settlement as the lands were under the flood. The written statement then proceeded to controvert all the allegations of the plaintiffs. This written statement was verified by one Ram Kishore Sen, a *mukhtar* of the then defendants. From the orders recorded in the order sheet on the 16th June, 25th June and 21st July 1879, it appears that the summonses in the suit had not even then been served upon all the defendants; but the order of the 12th August possibly implies that the case was then ready for trial. The issues were fixed on the 22nd August; but no copy thereof is available as the major portion of the record has been destroyed. Steps were then taken for the appointment of an *amin* for local investigation; his fees were deposited by the plaintiffs in due course and a writ for local inquiry was issued on or about the 21st November 1879. Thereafter, the case was adjourned from time to time on several occasions, as the *amin* had not completed his inquiry and returned the papers. On the 25th May 1880, the case was directed to be put up on the 4th June following, as the *amin* had not even then sent the papers and also "in view of compromise." On the 2nd and

(5) (1895) 2 Ch. 273; 64 L. J. Ch. 523; 12 R. 331; 72 L. T. 703; 43 W. R. 567.

(6) 16 Ind. Cas. 611.

(7) 9 B. & C. 840; 33 R. R. 353; 9 L. J. (o. s.) K. B. 33; 109 E. R. 313.

(8) 21 Ind. Cas. 538; 18 C. L. J. 187.

3rd June 1880, two petitions were presented, one on behalf of the plaintiffs, the other on behalf of the defendants, Exhibit 18 (1) and Exhibit 18 (2). These petitions were couched in much the same terms, were signed by the respective Pleaders and set out the terms of settlement. The recitals disclosed for the first time that the lands had been surveyed by a man named Ram Charan Bose, who had prepared a map on the 28th January 1880 and that the plaintiffs were entitled to 4 *kanis* out of the disputed lands as included within Bhaga, which lay on the left hand side of the line drawn from post 1 to post 44 on the map, while Sakhipura lay to the right hand side of that line. These petitions were laid before the Court on the 4th June 1880, when it was ordered that the suit be decreed in accordance with the terms of the compromise filed and the *amin* was directed to return the papers without taking up the work of local investigation (Exhibit 54). A decree was subsequently drawn up on the basis of this order (Exhibit 59). The manner in which the alleged settlement was notified to the Court has been criticised with some severity on behalf of the appellants. It has been argued with considerable force that if, as a matter of fact, Ram Charan Bose was, at the instance of both the parties, engaged openly in the work of local investigation and preparation of a map, it is difficult to understand why the information should be withheld from the Court and the erroneous impression deliberately created and steadily maintained for many months that the *amin* appointed by the Court, whose fees had been duly deposited, was engaged in investigation. No intelligible explanation has been offered why, after Ram Charan Bose had actually finished his map on the 28th January 1880, the Court should still be misled. It has consequently been suggested, not altogether without plausibility, that the entire proceedings in the suit are not free from suspicion. Stress has also been laid on the circumstances that Ram Kishore Sen, who verified the written statement of the Sakhipura proprietors, acted also as the *mukhtar* of their adversaries in various matters, and it has been suggested that in the present instance he betrayed his employers. In this connection, attention has been invited to the proceedings in execution of the compromise decree, which, it has been urged, are as much open to adverse comment as the proceedings in the suit itself. On the 18th August 1880, the decree-holders applied for execution of the decree of the 4th June 1880 (Exhibit 20 and Exhibit 60). In this application they prayed that they might be put in possession of the decreed lands, *i. e.*, the 4 *kanis* which they had obtained under the compromise. Several months were lost, either because the writ had not been put in or the fees of the *amin* not paid. Thereafter the writ was issued, and the 28th February 1881 was fixed for its return. On that date, as also on the 23rd March 1881, we find it recorded that the papers about delivery of possession had not been received back. On the 26th April 1881, we find it noted that the *amin* had put in the papers; but the order does not state whether the delivery of possession had been effected. We find, on the other hand, that the decree-holders were directed to take proper steps, and the case was adjourned to the 30th April. On that date, the case was struck off as the decree-holders had taken no steps. The appellants contend that this indicates that possession was never delivered, and they lay stress on the fact that as neither the map nor the decree gave any indication of the boundaries of the 4 *kanis* decreed to the plaintiffs, it was not possible for any *amin* to effect delivery of possession. The respondents, on the other hand, rely upon the oral evidence of their witness Ananda Chandra Bose; he alleges that possession was delivered by a Civil Court *amin*, Nanda Kumar Dutta, who fixed wooden posts on the ground as boundary marks, and adds that this took two days only. This witness is supported by Janaki Nath Dutta and Chandi Manjhi; but it is impossible to test their veracity as the lands were admittedly diluviated after 1881 and the alleged boundary marks could not be expected to survive the flood. But it is a matter for legitimate comment that if the delivery of possession was effected in the course of two days, the facts that the papers relating to delivery of possession were not returned for three months and even thereafter the decree-holders were called upon to take proper steps, require explanation;

none has been offered. It is consequently plain that although it may not be possible for the Court to hold affirmatively that the compromise decree in the suit of 1879 was obtained by fraud, the proceedings both in the suit and in the execution of the decree are full of unexplained difficulties and are calculated to excite grave suspicion as to their *bona fides*.

In support of the *second* objection it has been urged by the appellants that the settlement in the suit of 1879 is not shown to have been made with the authority or even with the knowledge of the Sakhipura proprietors. The written statement on their behalf was, as already stated, not verified by any of the parties themselves; it was verified by their agent, Ram Kishore Sen, who had in various matters acted as the *mukhtar* of their opponents. It is neither alleged nor proved that Ram Kishore Sen was authorised by his principals to bind them by a compromise. Nor has the position been taken up that the Pleaders engaged to conduct the defence were authorised, by the *vakalatnama* originally filed, to compromise the case. It has not also been argued that in the absence of authority expressly conferred on a Pleader he is competent to bind his client by a compromise. Consequently we need not determine, whether a Pleader can bind a client by a compromise of the suit unless he is specially authorised in that behalf – a question upon which judicial opinion has not been uniform: *Dighijoy Roy* v. *Ata Rahaman* (9). The plaintiffs, on the other hand, sought to prove that at the time when the settlement was effected, a fresh *vakalatnama* was filed in which the terms of the compromise were recited. The evidence of Ananda Chandra Bose on this point is not convincing; there is no satisfactory explanation of his presence on the occasion or why he should have read the *vakalatnamas* alleged to have been filed by both the parties; it is also a matter for comment that he should remember, after the lapse of thirty years, that the terms, if any, set out on the *vakalatnamas* were identical with these now found to have been inserted in the petition presented to the Court. No doubt, there is a presumption in favour of regularity of the proceedings in Court. But in the circumstances of this case, the plaintiffs cannot be deemed to have proved beyond all reasonable doubt that the compromise in the suit of 1879 was effected with the authority of the proprietors of Sakhipura.

In support of the *third* objection, it has been urged that some of the defendants were not parties to the suit of 1879, and they, at any rate, are not bound by the compromise made therein. It appears that Baikuntha Chandra Chakrabarty (defendant No. 4) was a party to the previous suit, but that defendants Nos. 3 and 5—9 were not parties. But it has been argued that as the property stood in the name of Baikuntha, he must be deemed to have acted on behalf of all members of the family. No foundation has been laid for this position. It may be conceded that a decree obtained against the head of a family in a suit to which the other members are not parties may be operative against the latter under certain circumstances, but this principle clearly does not apply unless it is shown that the matter was one in which the member sued was entitled to represent the whole family. [*Jogendra Deb* v. *Funindro Deb* (10), *Narayanaswamy Naidu Garu* v. *Tirumala Setti* (11), *Jaddo Kuar* v. *Sheo Shankar Ram* (12), affirmed by the Judicial Committee in *Sheo Shankar Ram* v. *Jaddo Kunwar* (13), *Kishen Parshad* v. *Har Narain Singh* (14) and *Kunj Behari Lal* v. *Kandh Parshad* (15)]. There is nothing to show in the case before us that Baikuntha had authority to bind the members of the family to which he belonged by a compromise with the plaintiffs; the mere fact that the property had been acquired by the family in his name would not necessarily justify the inference that he had such authority. It cannot consequently be held that the members of the Chakrabarty family, who

(9) 15 Ind. Cas. 156; 17 C. W. N. 156.

(10) 14 M. I. A. 367 at p. 376; 11 B. L. R. 244; 17 W. R. 104; 2 Suth. P. C. J. 517; 3 Sar. P. C. J. 32; 20 E. R. 824.

(11) 16 Ind. Cas. 698; 24 M.L. J. 79 at p. 83; (1913) M. W. N. 96.

(12) 7 Ind. Cas. 902; 33 A. 71; 7 A. L. J. 945.

(13) 24 Ind. Cas. 504; 18 C. W. N. 968; 20 C. L. J. 282; 36 A. 383; 12 A. L. J. 1173; 16 Bom. L. R. 810; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695.

(14) 9 Ind. Cas. 739; 38 I. A. 45; 33 A. 272; 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 13 Bom. L. R. 359; (1911) 2 M. W. N. 295.

(15) 6 C. L. J. 362 at p. 368.

were not parties to the suit of 1879, were bound by the settlement made therein. The decree has no greater effect than the argeement whereon it is based, and as there is no evidence that Baikuntha could have bound his co-sharers by an agreement made by himself alone without their authority in respect of the property jointly owned and possessed by them, they are not affected by the consent decree.

In support of the *fourth* objection, it has been argued that the consent decree has not been acted upon by the parties, but has, on the other hand, been repudiated by the proprietors of Sakhipura when sought to be used against them. It appears that in the course of proceedings under the Bengal Estates Partition Act, 1876, in respect of Sakhipura, the present plaintiffs intervened on the ground that lands which lay outside Sakhipura and within Chur Bhaga were attempted to be brought under partition. In support of their objection they relied upon the map in the suit of 1879; but the proprietors of Sakhipura promptly repudiated the map and the consent decree in a petition, dated the 17th June 1901 (Exhibit E); and they adhered to this position throughout the partition proceedings, Exhibit F, dated 27th April 1905, Exhibit LB, dated 7th June 1905, and Exhibit 2, dated 9th November 1905. There is thus no foundation for the suggestion that the proprietors of Sakhipura, though apprised of the proceedings in the suit of 1879, have acquiesced therein.

In support of the *fifth* objection, it has been urged that no question of settlement of the boundary between Bhaga and Sakhipura fell within the scope of the suit of 1879, that no such question was or could be determined by the decree made therein, and that the boundary then settled could not conclude the question now in controversy, as the title to other lands entirely distinct is in dispute. It is plain from an examination of the plaint in the litigation of 1879 that the suit was not brought for the purpose of demarcation of the boundary between Chur Bhaga and Chur Sakhipura. The claim was confined to specific lands; as to some of the lands, the plaintiffs claimed them as included in Chur Bhaga; as to others, they contended that they were entitled to a share as included in Sakhipura of which they were joint proprietors. The lands in the first schedule were comprised in three plots and the plaintiffs were awarded a decree by consent for four *kanis* out of the third plot. Assume that the *amin* re-laid a portion of the boundary between Chur Bhaga and Chur Sakhipura. It is plain that in so far as this was necessary for the decision of the controversy in the suit, and to such extent only, the parties would be bound. The petition presented to the Court which recited the terms of the settlement asked substantially for a decree for the four *kanis* allotted to the plaintiffs. The decree itself is undoubtedly capable of the interpretation that it gave the plaintiffs the four *kanis* mentioned. The decree does not explicitly declare that the boundary between Chur Bhaga and Chur Sakhipura was fixed as shown on the map of the *amin*; the decree could hardly do this when we find that the suit was not framed as one for demarcation of the entire boundary between the two *churs*. It is well settled, as was pointed out by the Judicial Committee in the case of *Kerr* v. *Nuzzar Mahomed* (16), that the rights of property as between two parties cannot be affected by a map drawn for a different purpose, a purpose not relevant to the subject of the dispute between them. To the same effect is the decision of Garth, C. J., in *Moni Roy* v. *Rajbunsee Koer* (17). There, in a suit for some land, a Judge had considered it necessary to find out the boundary between two villages, and had given a decision in favour of one of the parties, who, in a second suit of the same kind, but with reference to some other land, relied on the former decision to show that the land in dispute in the second suit must be his, if the finding as to the village boundary in the former suit was correct. This contention was overruled, and it was held that the finding as to the village boundary in the former suit was conclusive only as to the land in dispute in the former case, but did not make the former decision conclusive as to the entire boundary line itself. This view is based on obvious good sense and has been repeatedly adopted in this Court [*Kanto Prashad* v. *Jagat Chandra* (18), *Ranajit*

(16) 2 W. R. (P. C.) 28.
(17) 25 W. R. 393.
(18) 23 C. 335.

Sinha v. *Basanta Kumar* (19), *Priya Nath Mojumdar* v. *Mahendra Kumar Mitra* (20) and *Shib Charan Dey* v. *Nil Kantha Mahato* (21)]. The plaintiffs have consequently made an attempt to identify the lands in dispute in the suit of 1879, but the endeavour has been entirely unsuccessful. The map prepared in the suit of 1879 does not show the situation of the lands then in dispute; it does not even indicate the lands decreed to the plaintiffs. A fruitless attempt has been made to locate the lands from the boundaries of the three plots mentioned in the first schedule to the plaint in that suit, but in the absence of evidence to identify the localities mentioned in the boundaries, the attempt, as might have been anticipated, could not possibly succeed; the plaintiffs merely sought to express one unknown quantity in terms of others. There is this further difficulty that the eastern portion of the map, after station 44 and beyond the *done* (channel of water), has not been prepared to scale, as is obvious from a comparison with the corresponding locality on the case map. The explanation offered for this fact is that at that time there was no dispute in respect of that portion. If this be accepted as the true explanation why that portion of the map was not drawn to scale, it furnishes a good illustration of the danger of using a map prepared for one purpose for an entirely different purpose. We are consequently of opinion that the location of the boundary between station 1 and station 44 on the map (Exhibit 19A) prepared by Ram Chandra Bose in the suit of 1879 cannot be treated as conclusive as between the parties for the purpose of this litigation. That line, as depicted on the map, does not agree either with the *thak* line or the survey line; we do not know on what basis the line was drawn. It would obviously have not attained the ends of justice, if we had been constrained to adhere to a boundary line incorrectly drawn. This is well illustrated by the incongruous position which has resulted from the adoption of that line by the Subordinate Judge. The line between stations 1 and 44 does not constitute the complete boundary, and as it has been inaccurately drawn, it does not terminate either on the *thak* or on the survey line; the Subordinate Judge has, accordingly, been obliged to produce the line arbitrarily in a straight line towards the east, so as to make a complete boundary line. It is incontestible that this result, so eminently unsatisfactory, is avoided by the view we have adopted, *viz.*, that this line is not conclusive for the purposes of the present controversy which must be determined independently thereof.

The question next arises whether a decree should be made on the basis of the *thak* map as delineated on the case map. The Subordinate Judge has held that the *thak* line has not been correctly delineated. We are of opinion that this view is wellfounded. The plaintiffs pointed out to the *amin* on the 12th March 1909 an Aswatha tree as the point of commencement of the *thak* line; later, on the 6th January and 16th February 1910, they alleged that this was a mistake and prayed that the *thak* line might be re-laid. The Court refused the application as made at too late a stage of the case. In this Court, there has been considerable discussion at the Bar as to the correct tri-junction point from which the *thak* line should be re-laid; but although the parties are not agreed as to the situation of the true tri-junction point, it is plain that the line as delineated on the case map by the *amin* cannot be accepted as correct. The two possible alternatives are, either to have the *thak* line re-laid or to make a decree on the basis of the survey line which, it is admitted by both sides, has been correctly delineated on the case map by the *amin*. This is the third point raised in connection with the question of title. Now it may be conceded that the survey officers had, at their disposal, means of more accurate measurement than the *thak* officers had; but, as pointed out by this Court in *Abid Hossain Mandul* v. *Dowcurry Pal* (22) and *Nawab Buhadur of Murshidabad* v. *Gopinath* (23), no hard and fast rule can be laid down that a survey map is more reliable than a *thak* map. The true principle is that the map which more clearly agrees with the local land-marks is the one that should be

(19) 4 Ind. Cas. 81; 9 C. L. J. 597; 12 C. W. N. 759.

(20) 10 Ind. Cas. 376; 14 C. L. J. 578.

(21) 16 Ind. Cas. 747; 17 C. L. J. 642.

(22) 6 C. W. N. 629.

(23) 6 Ind. Cas. 392; 13 C. L. J. 625 at p. 632.

followed. This, however, is of no assistance in the case before us, because the lands in dispute were swept away by the action of the river more than once after the preparation of the *thak* map, and the identification of the local land-marks is attended with considerable risk of error. But we have two significant circumstances to assist us in the choice between the *thak* and the survey maps. In the *first* place, we know that the features of the land had been changed by diluvion which took place in the interval between the *thak* proceedings and the Revenue Survey; any disagreement, consequently, between the *thak* line and the survey line is attributable, *prima facie*, not to the inaccuracy of the *thak* measurements, but to the altered condition of the lands surveyed. In the *second* place, we find that even after the survey, the parties accepted the *thak* proceedings as evidence of their title and possession, and each of the contesting parties took steps in 1859, 1863 and 1864 for the rectification of what they considered to be errors in the *thak* map; moreover, so recently as 1888, lands were released to proprietors of Chur Bhaga on the basis of the *thak* map, as is clear from the *diara* survey map Exhibit 1 (1). The *thak* map was made in the presence of the parties or their agents and is *prima facie* binding on them: *Omrita Lal* v. *Kalee Pershad*(24). We are consequently of opinion that the decree in this case should be based, not on the survey map, but on the *thak* map after it has been re-laid with as much accuracy as practicable.

The only other question which requires consideration in the appeal by the proprietors of Sakhipura is that of limitation. The Subordinate Judge has correctly held that as, on the authority of the Judicial Committee in *Secretary of State* v. *Krishnamoni Gupta* (25), the rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, the only point for investigation is the period of time when the lands reappeared and became fit for occupation. Upon this part of the case, we are generally in agreement with the Subordinate Judge in his conclusion that the possession of the defendants after re-formation of the disputed lands has not extended over the statutory period. In fact, although the attention of the Court has been invited to portions of the evidence on the question of the time of re-formation of the re-formed lands, and their occupation by the defendants, it has been conceded by the appellants in the end that in respect of all lands which fall within the *thak* boundaries of the *churs* owned by the plaintiffs, the objection of limitation cannot be seriously pressed. We hold accordingly that the claim of the plaintiffs is not barred by limitation in respect of lands which lie within the *thak* boundraies of their *churs*.

We have finaly to consider the cross-appeal of the plaintiffs-respondents, in which they claim title, by adverse possession, to lands which lie beyond the *thak* boundaries of their *churs* and are comprised within the ambit of either Sakhipura or Tarabunia. To enable them to succeed in a claim of this description, they are bound to establish, in respect of specific parcels of land, that they have been in occupation thereof to the exclusion of the rightful owner continuously for a period of 12 years; for as was pointed out in *Mohini Mohan* v. *Promada Nath* (26) and *Jogendra Nath Roy* v. *Baladeo Das Marwari* (27), the theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession. Tested from this point of view, the claim by adverse possession set up by the respondents turns out to be entirely unsustainable. The attempt to identify and locate specific parcels whereof they allege to have held possession, has completely failed; while the evidence of continuous possession of any definite tract for more than 12 years is untrustworthy. We hold accordingly that the plaintiffs have failed to prove title by adverse possession to any lands not included within the *thak* boundaries of their *churs*.

The result is that this appeal is allowed, the cross-appeal dismissed and the decree of

(24) 25 W. R. 179.
(25) 6 C. W. N. 617; 29 C. 518; 4 Bom. L. R. 537; 29 I. A. 518.

(26) 24 C. 256; 1 C. W. N. 304
(27) 35 C. 961; 6 C. L. J. 735; 12 C. W. N. 127.

the Subordinate Judge is discharged. It is declared that the plaintiffs are entitled to possession of such portion of the disputed lands as lie within the *thak* boundaries of the property known as Bhaga Chur, Chur Datali and Chur Lasti. The case is remanded to the Subordinate Judge in order that the *thak* boundaries of the *churs* mentioned may be re-laid by a Commissioner, who will be free to take evidence to determine the tri-junction point from which the *thak* line is to be re-laid. The plaintiffs will be placed in possession of such lands as may be found to lie within the *thak* lines of the *churs* owned by them, and they will also recover a proportionate amount of the profits of the attached lands in deposit in the Collectorate. The plaintiffs will further recover mesne profits in respect of the lands decreed to them. As regards the costs in the Court below as also in this Court, each party will bear his own costs up to the present stage. The costs of the proceedings after remand will be in the discretion of the Court below.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 377 OF 1913.

CONNECTED WITH FIRST APPEAL No. 407 OF 1913.

March 24, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

CHUMMUN PRASAD CHOUBE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PRANPAT CHOUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition between father and son—Grandmother, whether entitled to share.

At a partition between a father and his sons, the grandmother is not entitled to a share under the *Mitakshara* Law. [p. 167, col. 2.]

Sheo Narain v. *Janki Prasad*, 16 Ind. Cas. 88; 9 A. L. J. 749; 34 A. 505, referred to.

First appeal from the decision of the Subordinate Judge of Gorakhpur at Basti, dated the 10th May 1913.

FACTS.—The following genealogical table shows the relationship of the parties:

RAM NATH CHOUBE

|

Musammat Dip Kali (wife) defendant No. 2

|

Pranpat Choube, defendant No. 1

|

Musammat Lakrani (1st wife) defendant No. 3,	*Musammat* Dhanwanta (2nd wife), defendant No. 4.
Chumman Prasad, plaintiff No. 1,	
Ram Birja, plaintiff No. 2.	

Chumman Prasad, son, and Ram Birja Choube, grandson of Pranpat Choube, sued Pranpat Choube, his two wives and his widowed mother, *Musammat* Dip Kali, for partition of the family property. Among other pleas, the plaintiffs alleged that *Musammat* Dip Kali was the step-mother of Pranpat Choube and was not entitled to a share at the partition. The defendants contended, among other things, that *Musammat* Dip Kali was the mother of Pranpat Choube and was entitled to a share at the partition. The Subordinate Judge held that she was the mother of Pranpat Choube, but she was not entitled to a share in the property. The Subordinate Judge's judgment being partly in favour of the plaintiffs and partly against them, both parties appealed to the High Court.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him Mr. *Iswar Saran*), for the Appellants.

Mr. *Wallach* (with him Mr. *Jang Bahadur*), for the Respondents.

JUDGMENT.—This and the connected Appeal No. 407 of 1913 arise out of a suit for partition, brought by the son and grandson of Pranpat Choube, defendant No. 1. The defendant No. 2 is the mother of defendant No. 1. Defendant No. 3 is the wife of defendant No. 1 and mother of plaintiff No. 1. The defendant No. 4 is, according to the plaintiffs, the mistress of defendant No. 1. According to the defendant No. 1 she is his lawful wife. The plaintiff's main objection to the decree of the Court below is that one-eighth of the estate which has been allotted to the minor plaintiff, has been placed in charge of the defendant No. 1. The case is really a very sad one. The family appears to

have been quite prosperous, possessed of a considerable amount of immoveable property and a good deal of produce of the land. The plaintiff No. 1 comes into Court alleging that his father (the defendant No. 1) is an immoral man, in that he is keeping defendant No. 4 as his mistress. The Court below has considered this question and has come to the conclusion that there is no truth whatever in the allegation. The defendant No. 1 himself went into the witness-box and proved that the defendant No. 4 was his married wife. This was an important admission. If she was a mere mistress, he could never hereafter deny that the lady was his wife. The lady appears to be of the same caste and a person whom he could legally marry. A number of witnesses were produced to prove the marriage, and the uncle of the lady deposed that he paid the expenses. The defendant No. 2, an old lady, proved that the marriage did take place. We entirely agree with the finding of the Court below that the defendant No. 4 is not the mistress but is the married wife of the defendant No. 1. It is an admitted fact that one Mohar Dat (the father-in-law of the plaintiff No. 1) was indebted to defendant No. 1 on a bond, that this bond was handed back by the plaintiff No. 1 to his father-in-law with an endorsenment of payment. The Court has found in another suit that this was a dishonest transaction between the plaintiff No. 1 and the father-in-law, and the latter was made responsible for the bond. Plaintiff No. 1 is at present about 23 years of age, and it seems pretty clear that the present suit is really brought at the instigation of Mohar Dat with the probable result that his son-in-law and his son-in-law's family will be ruined. Against the finding of the Court below of the legal right of the plaintiff No. 1 to have partition, no exception can be taken and we are reluctantly constrained to hold that the plaintiff is entitled to a decree for partition. Under the circumstances we think that it would be most undesirable that his son's share should be placed in his charge. The son's share will, of course, remain in charge of defendant No. 1 who will hold it on behalf of the minor plaintiff.

In the connected appeal it is alleged, *first*, that the plaintiff is not entitled to claim partition. As already stated this position cannot be supported. It is next said that *Musammat* Dip Kali is entitled to a share on partition. This is against the ruling in *Sheo Narain* v. *Janki Prasad* (1). It is lastly contended that one of the villages was purchased with money which belonged to *Musammat* Dip Kali. We entirely agree with the view taken by the Court below upon this point. The result is that both appeals fail.

We accordingly dismiss this appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

(1) 16 Ind. Cas. 88; 34 A. 505; 9 A. L. J. 749.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 749 OF 1913.

March 3, 1915.

Present:—Sir Donald Johnstone, KT., Judge.

MUHAMMAD NAWAZ—PLAINTIFF—APPELLANT

versus

GHULAM HAIDER AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof—Shamilat—*Sale—Interpretation of sale-deed—Misreading of record—Appeal, second.*

The burden of proving that the land was sold to a party lies heavily on that party where the land is not specifically mentioned in the deed of sale and cannot even be said to be mentioned by implication. [p. 167, col. 2.]

A second appeal is competent when the lower Appellate Court is led to a wrong finding through a misreading of the record on vital matters. [p. 168, col. 1.]

Second appeal from the decree of the Divisional Judge, Attock Division at Campbellpur, dated the 20th January 1913, reversing that of the Munsif, 2nd Class, Bhakkar, dated the 24th May 1912, decreeing the claim.

Mr. *Nand Lal*, for the Appellant.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—I have taken time to go carefully into this case. The burden of proving that this land was sold to them lies heavily on the defendants, because (*a*) that land is not mentioned specifically in the deed of sale and cannot even be said to be mentioned by implication, such phrases as *hakk-i-milkiyat-i-khud, ba jamia hakuk-i-dakhili-o-khariji* not importing sale of

shamilat, (*b*) two successive mutations, one on partition in favour of Sarwar and the other on demise of Sarwar in favour of plaintiff were effected without any protest on the part of the defendants. There can be no doubt that plaintiff actually had possession upon the second mutation and was later on ousted by defendants.

This burden of proof the defendants have wholly failed to discharge; the lower Appellate Court has made two cardinal mistakes in reading the record and this affords sufficient ground for interference on second appeal. The first mistake is in reference to the condition in the sale-deed, which purports to convey the same land as that already mortgaged, that if any numbers are omitted they shall also be considered sold, but the lower Appellate Court has failed to observe that the condition is not so general as here represented. It really is to the effect that if any numbers *out of khata* No. 324 have been omitted they shall be considered as sold. Now the land in suit forms no part of *khata* No. 324. Again, the lower Appellate Court errs as to date and says defendants could not have objected to the aforesaid mutations because the sale had not yet been mutated to them. The dates are these:

Sale 15th March 1904.

Mutation entered up 21st February 1907.

Partition (by which Sarwar got the land) *sanctioned* 8th May 1907.

Mutation on sale *sanctioned* 10th June 1907.

Mutation or death of Sarwar *entered up* 27th April 1908.

Sanctioned in favour of plaintiff 13th June 1908.

Mutation on partition *entered*, *i.e.*, sanctioned 15th June 1908.

Now there was nothing to prevent defendants, on 8th May 1907, from objecting that they had bought the land from Sarwar and that their names should be substituted for his, and still more they should, on 13th June 1908, have objected and pointed to the mutation of 10th June 1907. It appears thus that the learned Divisional Judge has gone wholly astray through misreading of the record in these two vital matters.

There are two other points in favour of plaintiff. The deed of mortgage which I have seen in no way helps defendants, and further the deed of sale speaks of the land sold as being under tenants, while the land in suit was at time of sale *banjar* and not in physical possession of any one.

In short the failure of defendants to prove their case is patent.

Appeal allowed and plaintiff's claim decreed with costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEALS NOS. 15 AND 32 OF 1914.

February 4, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

IN O. S. A. No. 15 OF 1914

RATNA BAI *alias* HIRA BAI AND OTHERS—APPELLANTS

IN O. S. A. No. 32 OF 1914

MURLIDOSS BRIJRATHNADOSS AND OTHERS—APPELLANTS

versus

THE OFFICIAL ASSIGNEE OF MADRAS AND ANOTHER—RESPONDENTS IN BOTH.

Insolvency—Insolvency Act, 1848, 11 *&* 12 *Vict. C.* 21, *ss.* 26, 86, 7, 21—*After-acquired property of insolvent, vesting of, in Official Assignee—Possession of insolvent for over* 12 *years, if adverse against Official Assignee—Limitation Act* (*IX of* 1908), *applicability of, to proceedings in insolvency—Claims relating to properties in hands of insolvent and his representatives—Jurisdiction of Court to decide on application.*

One *B* was adjudicated an insolvent in 1890 and he died in July 1913 and his sons and widow were found to be in possession of a house and considerable moveable property. The house was purchased in the year 1894 in the name of his mother who died in 1897 and after her death the registry of the house was transferred in the name of his wife. The Official Assignee claimed all the said property as the self-acquired property of the insolvent and made an application under section 26 of the Insolvency Act of 1848 for a declaration accordingly and for possession thereof. The sons and the widow of the insolvent pleaded, among other things, that the claim of the Official Assignee was barred by limitation and that the Insolvent Commissioner had no jurisdiction to try the claim on an application, but the Commissioner referred the Official Assignee to a regular suit only in regard to moveables and tried the claim as to the house:

Held, that the Insolvent Commissioner had jurisdiction to adjudicate the claim on an appli-

cation as that was the only and proper procedure to be followed. [p. 170, col. 2; p. 172, col. 2.]

Held, further, that the after-acquired property of the insolvent vested from the date of its acquisition in the Official Assignee and it was not necessary to have a judgment entered up under section 86 of the Insolvency Act of 1848; [p. 173, col. 2; p. 170, col. 2.] and

that the claim of the Official Assignee was not barred by adverse possession. [p. 172, cols. 1 & 2.]

In re Ackrill, 18 M. 24, referred to.

Per *Sadasiva Aiyar, J.*—When jurisdiction is given by Statute to a Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be filed in another Court or in the same Court in its ordinary original civil jurisdiction, the special procedure pointed by the legislature in respect of the decision of those particular questions ought to be brought to their natural and intended conclusion by the Court which is directed to try those questions and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs. [p. 170, col. 2; p. 171, col. 1.]

An insolvent, from the time of his adjudication as insolvent until his final discharge, by the force of the statutory provisions of the Insolvency Act, holds the position of an express trustee for his creditors and he cannot plead adverse possession against the Official Assignee. [p. 172, col. 1.]

Kristocomul Mitter v. *Suresh Chunder Deb*, 8 C. 556; 12 C. L. R. 253, dissented from.

Per *Napier J.*—The Limitation Act has no application to the case. It provides periods with reference to suits, appeals and applications, the last being matters arising out of suits, and under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court and the High Court has no jurisdiction to entertain any suit by the Official Assignee against the insolvent in the exercise of its original civil jurisdiction. [p. 174, col. 2.]

Quære:—Whether the doctrine of agency can be applied as between the Official Assignee and the insolvent though it may be resorted to in regard to the relations between the insolvent and third parties? [p. 174, col. 1.]

Appeals from the preliminary order, dated 8th December 1913,* and order dated 26th February 1914, respectively, of the Hon'ble Mr. Justice Wallis, in Insolvency Petition No. 2 of 1890.

FACTS.—One Brijrathnadoss Venkatadoss was adjudicated an insolvent in 1890 and obtained his personal discharge on the 5th May 1890. He died in July 1913, leaving him surviving his wife and four sons. They were found to be in possession of a house and considerable property. The house had been purchased in the year 1894 in the name of the insolvent's mother who died in 1897, and the Collector's certificate of the said house was transferred in the name of the insolvent's wife in 1909. The Official Assignee claimed all the moveable and immoveable property as the property of the insolvent and under section 26 of the Insolvent Act, 1848, took out a notice of motion in November 1913 to show cause why a declaration should not be made that all the said properties were the property of the insolvent and as such vested in the Official Assignee and why possession thereof should not be delivered to him. A preliminary objection was raised that the claim of the Official Assignee was barred by limitation. His Lordship the Chief Justice (then Mr. Justice Wallis) negatived the objection, and his judgment was as follows :—" A preliminary point was raised in this case that on the face of it the claim was barred by limitation, on the authority of an observation of Mr. Justice Wilson in *Kristocomul Mitter* v. *Suresh Chunder Deb* (1), where the learned Judge says, 'But even if I thought the defendant's title was not good on the above ground, it is good on another ground. Nilcomul's possession since 1882 was adverse possession against the Official Assignee' " ; the possession in that case, as in this, being possession acquired by the insolvent after the insolvency and before his discharge. I have great hesitation in differing from this as from any other proposition laid down by the learned Judge, but it is to be observed that these observations were *obiter*, that no reasons were given for them and that in *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (2), a Bench of this Court, consisting of the learned Chief Justice and Mr. Justice Subramania Iyer, refused to act on this view which would have afforded a ready answer to the case, and preferred to dispose of it on other grounds. Mr. Justice Wilson refers to *Herbert* v. *Sayer* (3), as containing the law as to the after-acquired property of a bankrupt. That case suggests, it does not lay down, that such property is to be regarded as acquired by the bankrupt as the agent of the Official Assignee, and that may now be taken to be settled law [*In re Bennet* ; *ex parte Official Receiver* (4)].

(1) 8 C. 556; 12 C. L. R. 253.
(2) 28 M. 368.
(3) (1844) 5 Q. B. 965; 8 Jur. 812; 2 D. & L. 49; 13 L. J. Q. B. 209; 14 E. R. 1512.
(4) (1907) 1 K. B. 149; 76 L. J. K. B. 134; 95 L. T. 887; 14 Manson, 6; 23 T. L. R. 99.

* See 22 Ind. Cas. 271—*Ed.*

It is not easy to see how, if the bankrupt acquired the property as agent of the Official Assignee, his possession can ever become adverse to the Official Assignee. A man who possessed himself of property in one character, it is well settled, cannot himself alter that character and begin to possess it in another character. However, even if it were held that the possession of the insolvent were adverse to the Official Assignee, there would be the other difficulty which was pointed out in the argument, namely, that as soon as the property was acquired by adverse possession by the insolvent, the section would again vest it *eo instanti* in the Official Assignee as after-acquired property. I hold that the claim is not barred by limitation." Then on the merits the learned Judge referred the Official Assignee to a regular suit so far as the claims to the moveables were concerned, inasmuch as the insolvent's wife and sons claimed the same as self-acquired property. But he decided to try the claim as regards the house and found in favour of the Official Assignee. His judgment in regard to jurisdiction was as follows :—"This is an application under section 26 of the old Insolvency Act. Having regard to the observations of Collins, C. J., in *Rowlandson* v. *Champion* (5), I consider that it may be properly dealt with under that section, so far as regards the claim to the house by the Official Assignee, I have already held that claim is not barred by limitation.

"I have noted that I decided not to deal with any other claim to the rest of the property on this motion. This is without prejudice to the Official Assignee's right to file a suit, if he so desires."

Messrs. *K. Ramanatha Shenai* and *A. Narayanasarma*, for the Appellants.

Messrs. *M. O. Parthasarathy Iyengar* and *M. D. Devadoss*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—I entirely agree with the judgment just now pronounced by my learned brother, and for the reasons stated by him, that the house in question could not be claimed by the insolvent's widow, Ratna Bai, through any gift from her mother-in-law, that the house vested in the insolvent on his mother's death in 1897 and that the property in the next instant passed over to the Official Assignee. The widow's case that she held it adversely to her husband afterwards is not worth serious notice. I have also nothing to add to the reasons given by my learned brother in support of his conclusion that for the vesting of the property in the Official Assignee, it is not necessary to have judgment entered up under section 86 of the Indian Insolvency Act of 1848 and I join with him in respectfully dissenting from the decision in *In re Ackrill* (6).

Coming to the contention that the Official Assignee should have been referred to a suit even as regards this house (as he was referred to a suit in respect of the moveables), I am inclined to hold that even as regards the moveables, the questions raised, not only might have been, but ought to have been decided in the insolvency proceedings themselves. There is nothing in the Insolvency Act of 1848 (which has continued to apply to present proceedings by reason of section 127, clause (1) of the new Insolvency Act) which empowers the High Court exercising jurisdiction in insolvency proceedings to refer the Official Assignee, who has taken such proceedings under section 26, to a similar suit on original side. In *In the matter of Umbica Nundun Biswas* (7) the learned Judges say (page 442): "We believe that it has always been the practice of this Court to abstain from deciding difficult questions of title under that section," that is, section 26 of the Insolvency Act of 1848, "and to leave parties to settle such questions by a regular suit and we entirely approve of that practice." Speaking for myself, I think that when jurisdiction is given by Statute to the Court sitting as an Insolvency Court to decide a case in proceedings taken in a particular form and when there is no special reservation of the remedy by a suit to be filed in another Court or in the same Court in its ordinary original civil jurisdiction the special procedure pointed out by the Legislature in respect of the decision of those particular questions ought

(5) 17 M. 21 at p. 23.

(6) 18 M. 24.
(7) 3 C. 434; 1 C. L. R. 561.

to be brought to their natural and intended conclusion by the Court which is directed to try those questions, and the Court has no jurisdiction to refer the applicant to resort to another mode of seeking the same reliefs. As, however, it is the same Court, namely, the High Court, which (after the Supreme Court was abolished) tries the suit to which the Assignee is referred, the judgment in the suit to which the Official Assignee is so referred, might be taken as a further judgment of the High Court in the insolvency proceedings in respect of the moveables and the matter becomes one of mere, form and not of substance or jurisdiction.

As regards the last question (prescriptive title) if section 28 of the Limitation Act applies, there can be no doubt that not only the Official Assignee's right to the property was extinguished, but the person whose adverse possession so extinguished the Official Assignee's right acquired a title to the property. Section 28, no doubt, does not expressly state that the person in adverse possession himself gets the right which has been extingnished in his opponent. But as West, J., pointed out in *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande* (8), and as Sir R. Couch, C. J., said in *Ram Lochun Chuckerbutty* v. *Ram Soonder Chuckerbutty* (9), "the title of a true owner is, to use the language of the Judicial Committee, extinguished in favour of the persons who have been in possession of the land for more than 12 years." Statutes of Limitation, though they are in form, they are construed so as to operate as laws of "acquisitive prescription." See also *Budesab* v. *Hanmanta* (10), in which it is said that adverse possession for more than 12 years "creates" a title by negation in the occupant which he can actively assert, if he loses possession, even against the true owner," quoting *Scott* v. *Nixon* (11), *Brassington* v. *Llewellyn* (12) and *Sanders* v. *Sanders* (13).

(8) 9 B. 198.
(9) 20 W. R. 104.
(10) 21 B. 509 at p. 514.
(11) 3 Dr. and War. 388; 2 Con. & L. 185; 6 Ir. Eq. R. 8; 61 R. R. 84.
(12) 27 L. J. 9 Ex. 297; 1 F. & F. 27.
(13) 19 Ch. D. 373; 51 L. J. Ch. 276; 45 L. T. 637; 30 W. R. 280.

The next question is whether section 28 of the Limitation Act is applicable so as to extinguish the Official Assignee's right and to vest it in the insolvent. That depends on the answer to the question, whether the Official Assignee had a right to institute a suit for possession against the insolvent in respect of the property that vested in the Official Assignee. Section 21 of the Act of 1848 directs the Official Assignee to reduce into possession all the property of the insolvent. The Assignee being an officer of Court in whom the property of a party to a litigation (namely, the insolvent) has become vested by operation of law, it follows that all questions between that party and Official Assignee in respect of that property have become the subject of the insolvency proceedings themselves. All assets which become vested in the Official Assignee for the purpose of the insolvency proceedings become part of the property involved in such proceedings. Now it is clear law in an ordinary suit if *A* sues on a good title for possession of his land after 11 years of dispossession, even if the defendant continued in possession for another 12 years during the pendency of litigation and before the suit became finally ripe for decision, judgment ought to be given for possession in plaintiff's favour, the continuance of the defendant's possession for 12 years during the pendency of the suit being wholly ignored. It seems to me that on the same principle rights to properties, which are or become involved in the insolvency proceedings and which rights have to be decided in those proceedings, cannot be affected by the possession in any of the parties to those proceedings during the continuance of those proceedings.

Under sections 20, 21 and 7 of the Insolvency Act, the Official Assignee becomes vested with the rights of the insolvent in all the real and personal estate of the insolvent for certain purposes, those purposes being shortly stated in section 20, to be used in "trust for the benefit of the creditors of such insolvent". Thus the Official Assignee is clearly made an express trustee for the benefit of the insolvent's creditors. Under the new Act, section 33, every insolvent has "to wait at such times and places on the Official Assignee as may be required by the Official Assignee" and

he is also "to aid to the utmost of his power in the realisation of his property and the distribution of the proceeds among his creditors." Though the duty of the insolvent to assist the Official Assignee and the creditors is not stated in such express terms in the old Act of 1848, I am inclined to hold that from the time of his adjudication as insolvent until his final discharge, the insolvent, by the force of the statutory provisions in that Act also, holds the position of an express trustee for his creditors just like the Official Assignee and as a trustee can never plead adverse, that is, hostile possession against his *cestui que trust*, the insolvent cannot also do so. It is on this principle that all the properties acquired by him become vested in the Official Assignee for the benefit of his creditors. Further, any possessory right which he gets by possession for say six months becomes vested in the Official Assignee, because that possessory right is also property belonging to the insolvent and if a man is prohibited by Statute from having such possession in himself as will entitle him to claim for himself the possessory right, it follows that possessory right which also becomes his every six months and which is lost in favour of the Official Assignee at the end of the six months, cannot go on accumulating for 12 years so as to give him a prescriptive title at the end of the 12 years. The accumulation cannot go on when the units which are to be accumulated become non-existent. A man who is prohibited by the Statute to claim hostilely and adversely to the Official Assignee and to his creditors represented by the Official Assignee cannot, it seems to me, be allowed to set up that he did so act adversely or hostilely. I, therefore, respectfully dissent also from the decision in *Kristocomul Mitter* v. *Suresh Chunder Deb* (1), in which it was held that an insolvent can hold after-acquired property adversely to the Official Assignee.

In the result I concur in dismissing the appeals with costs.

NAPIER, J.—These are appeals from two judgments of the Chief Justice (then Mr. Justice Wallis) in Insolvency Petition No. 2 of 1890, arising out of a motion made by the Official Assignee for a declaration that certain moveable and immoveable property was the property of the insolvent. The other parties were the widow and the four sons of the insolvent. The learned Judge declined to deal with the moveable property and referred the Official Assignee to a suit. But he inquired into the claim for the immoveable property and held that it vested in the Official Assignee. The first judgment dealt with the question of limitation and the second with the other points arising in the matter. I shall deal with both in one judgment.

The points urged before us, some of which were also urged before the learned Judge, are, (1) that the Court had no jurisdiction to entertain the motion as the insolvent was dead, (2) that the matter was not one which could properly have been dealt with on motion, (3) that the property belonged to the widow of the deceased, either by gift from her mother-in-law or by adverse possession, and (4) that even if at one time it vested in the Official Assignee through the insolvent, the latter had acquired against the Official Assignee a new title by adverse possession.

The widow's claim by gift from her mother-in-law is given up, there being no registered document. Her claim by adverse possession is negatived by the learned Judge, on the ground that the husband treated the property as his own by mortgaging and that, therefore, the evidence did not establish possession in her at all. I entirely agree in this conclusion.

It remains to consider the claim through the insolvent. I am entirely unable to accept the contention that the Court had no jurisdiction. The suggestion was that the property had not vested in the Official Assignee completely before the death of the insolvent, the argument being that judgment should have been entered up under section 86 of the Indian Insolvency Act of 1848, 11 and 12 Vic., C. 21, and reliance is placed on the case reported in *Ackrill, In re* (6) and the cases quoted therein. Undoubtedly there is an observation in that case which supports the contention. But I am unable to agree with the observations of the learned Judge therein, and think that they must have been intended to be limited to the facts of that case, which was one of money paid under a policy of insurance on th life of the insolvent to a person who had

purchased his interest in the policy from the Official Assignee. It being found that the purchase was partly for the benefit of the insolvent the Court held that it vested in the Administrator-General, it being treated as property acquired after death. The observation, however, is as follows: "Seeing that future-acquired property does not vest in the Official Assignee from the date of the filing of the petition, it is only by proceedings subsequently taken during the lifetime of the discharged insolvent that it may be made available for the scheduled creditors when a judgment is entered up under section 86 of the Insolvency Act." With great respect to the learned Judge, if he intended this observation to apply to property acquired by the insolvent prior to his death, it is not supported by the language of the section or the recognised practice of the Court. Section 86 clearly has application only to the conditions that arise after the granting of a discharge in the nature of a certificate. After the discharge has been granted the Insolvency Court has no jurisdiction and, therefore, for the purpose of making future-acquired property available for the creditors, the Court was empowered on granting the final discharge to make it a condition that the insolvent shall consent to judgment being entered up against him in the High Court for so much of the creditors' claims as appear at that time to be due. To apply it to the stage prior to the issue of the certificate would be inconsistent with the clear language of the Act and create a double jurisdiction over the insolvent. Sections 7 and 11 are perfectly clear. By the vesting order all the real and personal estate and all future estate, right, title and interest in real or personal estate etc., is vested in the Official Assignee for the time being, and by section 21, every such Assignee is required with all convenient speed to take possession of all such estate of which immediate possession may be obtained and use his best endeavours to reduce into possession the rest of such estate. By the terms of the Act nothing further is required to complete the title of the Official Assignee. Mr. Shenai has relied on certain English cases in support of his contention. It is sufficient to say that those decisions are on Insolvency Acts with an entirely different procedure, a procedure under which future-acquired property does not vest in the Official Assignee until an order has been made on motion after notice to the insolvent. These cases are of no assistance to us in construing the Indian Insolvency Act. There can be no question that all further-acquired property at once vests in the Official Assignee and this is the every day practice of the Court, vide *Rowlandson* v. *Champion* (5), and *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (2).

The next point is that the learned Judge should have referred the Official Assignee to a suit. This is entirely a matter for the discretion of the Court, and it is hardly necessary to say that we shall be slow in appeal to differ from the view of a Judge on the original side on a matter of discretion. Further in my opinion the learned Judge exercised, if I may say so, a very wise discretion. The two claims were of an entirely different character. The widow and the sons claimed the moveable property against the insolvent as being their self-acquired property. On that view they were third parties, and although the Court has power under section 26 and other sections to adjudicate on the claim, the learned Judge thought a regular suit would be the more fitting course. The claim for the house was not against the insolvent but through, him and was a matter entirely between him and the Official Assignee. The disposal of the matter by the learned Judge as Commissioner was, therefore, *prima facie* the more proper course.

I now come to the last point which is a far more difficult question. The facts are as follows: The house was purchased by the insolvent's mother from one of the creditors in 1894, four years after the petition. In 1897 the mother died and the property undoubtedly vested in the insolvent. From that date to the year 1913 when he died, he was in undisputed possession of the house. It is contended that, if the title of the Official Assignee accrued from the date when the insolvent acquired the property in 1897, which he undoubtedly did, the insolvent has acquired by 12 years' adverse possession a title against the Official Assignee by virtue of Article 144 and section 28 of the Limitation Act, IX of 1908,

The learned Judge has negatived this contention on two grounds: (1) that the possession of the insolvent was that of an agent for the Official Assignee and (2) that if the title did vest in him in the year 1909 by 12 years' adverse possession, it immediately re-vested in the Official Assignee. It is argued that both these views are incorrect. Speaking for myself I am not prepared to rest my decision on either of these views, though I must not be taken to have dissented from them. I have grave doubts whether the decisions that have held the insolvent to be an agent of the Official Assignee can be applied as between them. The learned Judge relies on *In re Bennet*; *Ex parte Official Receiver* (4) in support of the proposition. Quoting *Herbert* v. *Sayer* (3), and *Cohen* v. *Mitchell* (14), Bigham, J., states that the first case establishes that a bankrupt who acquires property after his bankruptcy acquires it as agent for the trustee and is entitled to deal with it as such agent, unless and until the trustee as principal intervenes. Tindal, C. J., gives as the basis of that decision that otherwise there would be no protection to persons dealing with an uncertified bankrupt and in *Cohen* v. *Mitchell* (14), Lord Esher states the proposition as follows:—"Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee." It is clear, therefore, that the cases at all events confine the proposition to the relations between the insolvent and third parties and expressly base it on the protection of the rights of third parties.

The learned Judge also relies on the fact that this contention would have afforded a ready answer in *Abdul Kareem Sahib* v. *The Official Assignee of Madras* (2) but that decision did not turn on that point. That is so, but it is clear from the report that the point was not raised. In *Suja Hossein* v. *Monohur Das* (15), O'Kinealy and Hill, JJ., took the opposite view, though in that case the basis of the decision in favour of the insolvent appears to have been that the Official Assignee had knowledge of his possession and that, therefore, the possession was adverse. For these reasons I am doubtful whether the doctrine of agency is an answer to the claim by adverse possession. I am further doubtful whether assuming a title by adverse possession to have been acquired, that title would vest in the Official Assignee. Section 28 of the Limitation Act does not say in express terms that the title is acquired. It says that "at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished." It is true that decisions have construed this as meaning that the title becomes vested in the adverse owner. But it seems to me to be rather straining the language of the section to say that, although the Official Assignee's title has been extinguished, he at once acquires a new title. I prefer to rest my decision on the view that the Limitation Act has no application. The Limitation Act provides for periods with reference to suits, appeals and applications, the last being applications in matters arising out of suits. It is contended that the Official Assignee could have brought a suit against the insolvent. In my opinion the High Court would have no jurisdiction to entertain any such suit. Under the Insolvency Act the insolvent becomes subject to the peculiar jurisdiction of the Insolvency Court. Orders are made against him on the application of the Official Assignee. He can be directed to hand over property and he can even be tried and sentenced by the Commissioner. Where the intervention of the procedure of the High Court is provided for, it is only, as pointed above, for the purpose of affecting him after he has passed out of the jurisdiction of the Insolvency Court, and even then it has to be noted that by section 86 no proceeding by suit in the High Court is contemplated, but only that he shall *consent to judgment* being entered up against him in the High Court. It seems to me impossible that there could be a concurrent jurisdiction with respect to the insolvent. Obviously if the Official Assignee could bring a suit against the insolvent in the High Court, the latter could institute a suit against the former. I have asked for a reference to any case where either of these

(14) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell, 207.

(15) 24 C. 244.

have been done and the learned Advocate has been unable to refer me to any. It seems to be impossible that the Legislature could have contemplated that a man should in respect of his property be subject to two concurrent jurisdictions and that while the Commissioner in Insolvency was making an order against the insolvent with respect to any property, the High Court might be deciding that he was entitled to the property. Such a position would, of course, lead to conflict and an insolvent might, if that were possible, find himself being tried for contempt by the Insolvency Court for claiming the benefit of a decree of the High Court. I have no doubt that there has never been either in the Supreme Court or in the High Court any original civil jurisdiction as between the Official Assignee and an insolvent. The Official Assignee is an officer of the Court in a position analogous to that of a Receiver. A Receiver would not be required to proceed by suit in ejectment against a party who persists in remaining in possession of a portion of the property, but would apply to the Court for orders for his eviction *vide* Kerr on Receivers (6th edition), page 226, and *In re Sacker, Ex parte Sacker* (16), the judgment of Fry, L. J., on page 185. In like manner under the Insolvency Act the Official Assignee could apply for orders in respect of a recalcitrant insolvent, and I have no doubt that the Court could deal with him, if necessary, in contempt. It is true that there is no provision in the Insolvency Act of 1848 corresponding to the specific words in the Presidency Towns Insolvency Act, III of 1909, section 33 (4), under which such an insolvent is held to be guilty of contempt of Court and can be punished accordingly, and that though the old Act specifically provides for orders to deliver up property being issued against third parties, it nowhere speaks of such orders as against the insolvent. But the absence of the specific provision with regard to a person, who is under the personal control of the Court, no more prevents the application of the process for contempt against him than does the corresponding absence of any such provision in the case of Receivers or with respect to other disobedience of a party to suit to the orders of the Court, where the Court has been held to have an inherent power to commit. I am not certain that this procedure by contempt is not of itself an answer to the theory of adverse possession, for it would be strange that an insolvent could acquire a title to property by refraining from doing his duty to assist the Official Assignee in realising his assets for the creditors. I am aware that in *Abdul Kareem Sahib* v *The Official Assignee of Madras* (2) it was held that there is no provision in the Insolvency Act of 1848 imposing upon an insolvent the duty of disclosing to the Official Assignee that he has become possessed of property since the making of an order of personal discharge, and that consequently non-disclosure by an insolvent that he has become so possessed of a house cannot be regarded as a fraud either on the creditors or on the Official Assignee, so as to render section 18 of the Limitation Act applicable. But speaking with the very greatest deference to the learned Judges, I am not satisfied that that view is correct. It is the duty of the insolvent to assist the Official Assignee. They are not at arm's length and it is difficult to draw a line between non-disclosure and concealment. I am more inclined to take the view that section 33 (4) does not alter the law, and if so, whether it be fraud within section 18 of the Limitation Act or whether the principle is that an insolvent will not be allowed to defy the jurisdiction of the Insolvency Court over his property, I am inclined to think that he could not rely on adverse possession against the Official Assignee. It is not, however, necessary to decide this point and I rest my decision on the language of the Insolvency Act. Dismissed with costs. (One Counsel).

Appeals dismissed.

(16) 22 Q. B. D. 179; 58 L. J. Q. B. 4; 60 L. T. 344; 37 W. R. 204.

MOTI LAL *v.* GANGADHAR.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 6 OF 1915.

March 20, 1915.

Present:—Mr. Justice Chamier.

MOTI LAL—DEFENDANT—APPLICANT

versus

GANGADHAR AND OTHERS—PLAINTIFFS —RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115—Judgment delivered—Formal decree not prepared—Case decided—Appeal allowed—Revision, whether maintainable.

Where a Subordinate Judge has delivered judgment in a case and all that remains is the preparation of a formal decree, the case must be deemed to have been decided and if an appeal lies against such decree, the High Court would not interfere in revision under section 115 of the Civil Procedure Code.

Civil revision against an order of the Subordinate Judge of Mirzapur.

Mr. *L. M. Banerji* (with him Mr. *P. L. Banerji*), for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This is an application by the defendant in a suit brought against him by the respondents for dissolution of partnership and for accounts. The application is for revision of an order dismissing the applicant's objections to a Receiver's report, because the applicant failed to deposit in Court Rs. 220 as directed by the Subordinate Judge. It appears that the applicant's objections were filed on December the 2nd, 1914, and that he had at the same time applied for the issue of summonses to witnesses to support his objections. The order passed on that was "file with the record." Seven days later the case was taken up by the Subordinate Judge, who proceeded to examine the objections. He evidently came to the conclusion that many of the objections had been put forward in order to gain time and to prolong the proceedings, and he ordered that the objector should deposit Rs. 10 for each objection, or Rs. 220 in all, to be awarded to the plaintiffs and the Receiver on account of costs if they appeared to be entitled to costs. The applicant having failed to deposit the money, his objections were dismissed. The plaintiffs thereupon withdrew their objections; the Subordinate Judge accepted the report of the Receiver and directed that a decree should be prepared for the sums specified in that report with costs and interest. By means of applications to this Court the applicant endeavoured to delay the preparation of a formal decree; but this attempt was defeated by the other side, who managed not only to procure the preparation of the decree but also arrested the applicant in execution thereof even before the formal decree had been prepared. The proceedings in this case since December the 9th 1914 have been certainly of an extraordinary character, particularly the proceeding in which the applicant was, so to speak, made to bet Rs. 10 on each of his objections. If I could see my way to interfering with the orders that have been passed, I should certainly do so, though I cannot say what would be the proper order to pass if the merits of the objections were enquired into. Under section 115, Civil Procedure Code, this Court may call for the record of any case which has been decided by a Subordinate Court and in which no appeal lies. There has been some difference of opinion as to what amounts to a case within the meaning of this section. But there can be no doubt that a case had been decided before this application for revision was presented and that an appeal lay to this Court. The Subordinate Judge had delivered judgment in the case, and all that remained was the preparation of a formal decree. It is quite impossible for me, consistently with the decisions of this Court, to hold that this application is maintainable. The applicant's remedy is evidently by way of appeal against the decree, and the fact so much pressed on me by the applicant that an appeal will be a most expensive proceeding is no reason whatever for allowing this application.

I accordingly dismiss it with costs.

Application dismissed.

CALCUTTA HIGH COURT.

CIVIL RULES *Nisi* NOS. 360 AND 1090 OF 1914.

January 26, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Walmsley.

IN NO. 360 OF 1914.

SATYENDRA MOHAN GHOSE AND OTHERS—PETITIONERS

versus

RAJ MOHAN GUHA AND OTHERS—OPPOSITE PARTIES

IN NO. 1090 OF 1914.

Srimati UDAYTARA CHOWDHURANI AND OTHERS—PETITIONERS

versus

RAJ MOHAN GUHA AND OTHERS—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), s. 100, Rules made under—Common manager, powers and duties of—High Court, jurisdiction of—Common manager, position of.

The High Court having made rules under section 100 of the Bengal Tenancy Act, defining the powers and duties of managers, it has power under section 15 of the Charter to superintend and revise the orders of a District Judge. [p. 177, col. 2.]

The position of a common manager under the Bengal Tenancy Act is analogous to that of a Receiver appointed by the Court under the provisions of Order XL of the Code of Civil Procedure, save and except that he is not liable to be sued. [p. 177, col. 2.]

Naba Kishore Mandal v. *Atul Chandra Chatterjee*, 16 Ind. Cas. 193; 17 C. W. N. 846; 40 C. 150, followed.

In the matter of Common Manager's Case No. 1 of 1886 of the Court of the District Judge of Dacca.

Mr. *Casperz* (Counsel), Dr. *Sarat Chandra Basack* and Babu *Bepin Chandra Bose*, for the Petitioners.

Dr. *Rash Behary Ghose* and Babus *Joges Chandra Roy*, *Dwarkanath Chakravarti*, *Trailokhya Nath Ghose*, *Upendra Lal Roy* and *Jatindra Mohan Ghose*, for the Opposite Parties.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.

HOLMWOOD, J.—Two Rules were obtained in this matter of a common manager for an estate in Dacca. The first, which is Rule No. 360, was a Rule calling upon the opposite party to show cause why the order of the District Judge refusing to remove the common manager should not be set aside on the grounds stated in the petition, and why such other order should not be passed as to this Court may seem fit. The second Rule, No. 1090, was in respect of a specific order made by the District Judge permitting the common manager to raise Rs. 7,000 for litigation and other necessary purposes by giving *karmi* grants to *raiyats*.

With regard to the *first* matter, we do not in any way wish to enter into the question whether the common manager is good or bad or whether he ought or ought not to be removed. What we do find is that the District Judge has not made the inquiry which, in our opinion, he should have made upon the allegations before him and which under jurisdiction conferred on him by section 98 of the Bengal Tenancy Act he was bound to make. As a matter of fact a question has been raised as to the jurisdiction of this Court to interfere. But it is obvious that this Court having made rules under section 100 of the Bengal Tenancy Act, defining the powers and duties of managers, it must have power under section 15 of the Charter to superintend and revise the orders of the District Judge under Chapter IX. It has been laid down in the case of *Naba Kishore Mandal* v. *Atul Chandra Chatterjee* (1), that the position of a common manager under the Bengal Tenancy Act is analogous to that of a Receiver appointed by the Court under the provisions of Order XL of the Code of Civil Procedure, save and except that he is not liable to be sued. The learned Judge tells us that the parties were represented by legal practitioners in his Court and that he only took notice of such points as they chose to press before him. That does not appear to be the intention of the Act. If, as was argued by the other side, this is not, strictly speaking, a judicial proceeding, then those learned gentlemen had no authority to press or to waive any point. As a matter of fact it is, in our opinion, a power which the Judge is bound to exercise judicially and the position of the learned legal practitioners who appeared before him is that of *amicus curiæ*. It does not in any way derogate from the responsibility of the Judge himself to decide on the allegations which are made, either by taking evidence himself where questions of fact are

(1) 16 Ind. Cas. 193; 17 C. W. N. 846; 40 C. 150.

involved or by appointing a Commissioner to go into any necessary accounts or other matters which require local investigation. It is impossible for the Judge to say that the manager has discharged his duty properly, in the face of positive allegations of misfeasance, without making any inquiry and without taking any evidence.

We are, therefore, of opinion that this Rule No. 360 should be made absolute and the case should be sent back to the learned District Judge, and that he should make an inquiry, either by himself or by a Commissioner, into the allegations which go contrary to the rules framed under the Bengal Tenancy Act, and also into any allegations which go to show that the common manager ought to be removed by reason of his having infringed any of the provisions of section 98. We think, in the circumstances of the case, as these attacks upon the manager have been made by various co-sharers at distant periods during the time of his management, that in the first instance the expenses of the commission should be deposited by the parties who now seek it; but the ultimate costs will, of course, abide the result of the inquiry which is to be made. We assess one hearing fee of four gold *mohurs* to be borne by the several parties who are appearing to show cause.

With regard to the other Rule, No. 1090, we do not think that any question of jurisdiction under the provisions of the Code or the Charter arises. The learned Judge has to decide for himself whether the specific sum asked for by the common manager should be raised or not, and if in the exercise of his discretion he finds, as in this case, that it is necessary, there does not seem to be any reason or indeed authority for interference by this Court.

The Rule No. 1090, as regards the raising of Rs. 7,000, therefore, will be discharged with costs, two gold *mohurs*, to the common manager.

WALMSLEY, J.—I agree in the orders.

Rule No. 360 *made absolute;*
Rule No. 1090 *discharged.*

MADRAS HIGH COURT.
FULL BENCH.

REFERRED CASE No. 10 OF 1914.

March 18, 1915.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

GUDA WILLIAM—PLAINTIFF

versus

GUDA KARUNAMMA—DEFENDANT.

Divorce Act (IV of 1869), *ss.* 16, 17, 69—*Divorce decree by District Judge—Reference to High Court—Practice—Parties absent, effect of—Decree* nisi, *definition of—Prostitute, who is—Evidence Act (I of* 1872), *s.* 112—*Legitimacy.*

Per *Wallis, C. J. and Ayling, J.*, (*Sadasiva Aiyar, J.*, dissenting.)—The jurisdiction of the High Court to confirm the decree in a divorce suit arises immediately upon a reference. To complete that jurisdiction it is not necessary that there should be a personal appearance of the petitioner before the High Court. [p. 179, col. 1.]

Per *Sadasiva Aiyar, J.*—The order passed in a divorce case by a District Court is not a decree *nisi*. It is only a divorce decree passed by a High Court on its original side which is called a decree *nisi*. Under the Divorce Act the person who wants the confirmation of a decree pronounced by a District Judge ought to make an application to the High Court for confirmation and without such application the High Court should not confirm the decree passed by the District Judge. [p. 179, col. 2.]

William Arthur Forshaw v. *Eunice Geraldine Forshaw*, 3 Ind. Cas. 969; 6 A. L. J. 793; 6 M. L. T. 96; 31 A. 511, followed.

The mere fact that a woman talks promiscuously with all, does not show her to be a prostitute, though she may be a coquette or a flirt. [p. 180, col. 1.]

Roe v. *Roe*, 3 B. L. R. App. 9, followed.

The presumption of a child's legitimacy can be said to be rebutted, if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband before conception had not access to his wife. [p. 180, col. 2.]

Atchley v. *Sprigg*, (1864) 33 L. J. Ch. 345; 3 N. R. 360; 10 Jur. (N. S.) 144; 10 L. T. 16; 12 W. R. 364; 143 R. R. 357: *Barony of Saya and Sele*, (1848) 1 H. L. C. 507; 9 E. R. 357, followed.

Case stated under section 17, Act IV of 1869, by the District Judge of Godavari at Rajahmundry, submitting for confirmation of the High Court the decree *nisi* passed in Original Suit No. 15 of 1914.

JUDGMENT.

WALLIS, C. J.—It has always been the practice of this Court, since the passing of the Indian Divorce Act of 1869, to post and dispose of decrees sent up from the District Court for confirmation after

notice to the parties without requiring the petitioner to appear and move for confirmation. I see no sufficient reason to depart from this practice, which appears to me to give effect to the intention of the Legislature. It was in the interest of poor suiters that jurisdiction in divorce was conferred upon District Judges instead of on a Central Divorce Court as in England, and it would be a restriction of the boon to require a petitioner who has obtained a decree in a District Court, to take proceedings for confirmation in the High Court. The mere appearance of the petitioner would be no protection against collusion which is guarded against by the other provisions of section 17, and as regards the possibility of the parties having died or come together again subsequent to the decree of the District Court the serving of notice seems a sufficient safeguard.

As to the facts the petitioner has no doubt failed to prove the specific act of adultery shortly after the marriage on which he relied, besides which condonation has been proved. But with regard to the allegation that the petitioner was not the father of the infant born to the respondent in September 1913, the District Judge, who saw the witnesses, has accepted the evidence of witnesses who, if believed, in my opinion sufficiently prove non-access on the part of the petitioner and misconduct on the part of the respondent. The case really turns on whether the husband had access to his wife about the time the child was conceived. The parties had been separated some months before, when at the instance of the missionaries an effort was made to reconcile them. Plaintiff's 2nd witness speaks to going with the petitioner to her mother's house and finding her absent and to staying the night and their going over to Achutapuram, where she was keeping a night school for adult men as well as boys. There does not seem to have been any opportunity of access on that occasion, and the evidence, in my opinion, negatives anything of the kind. The fact of her having previously to this contracted a venerial disease which she did not accuse her husband of having given her and of her keeping the night school shows the sort of woman she was. I think the adultery is sufficiently proved and would confirm the decree.

AYLING, J.—I agree.

SADASIVA AIYAR, J.—This case is described as a "case referred under section 17 of Act IV of 1869 for confirmation of the *decree nisi* passed by the District Court of Godavari in Original Suit No. 15 of 1914" on the file of that Court. I have to make two remarks in connection with this. In the *first* place, section 14 of the Act IV of 1869, does not call the decree pronounced by the District Court a *decree nisi*. It is only a divorce decree passed by the High Court on its original side which is called a *decree nisi* in section 16 of the Act. In the *second* place, there is no provision for the District Court referring the decree to this Court. Section 17 merely says "that every decree for dissolution made by the District Judge shall be subject to confirmation by the High Court." I am not aware of any rules passed by the High Court under section 62 of the Indian Divorce Act enabling the District Court to make any such reference. I might further add that in this case I find that a head clerk of the District Court, as the officer in charge in the absence of the District Judge from the station, has made this reference on the 13th May 1914. Even holding that a reference by the District Court is contemplated by the Act and we are bound to act on such reference, I think we must decline to act on a reference made by the head clerk of the District Court who is left in charge of the administrative duties and of the establishment during the absence of the District Judge.

I further think that even if a reference is admissible and is properly made, the person who wants the confirmation of the decree pronounced by the District Judge ought to make an application to this Court for such confirmation and without such an application, I am inclined to hold with the Full Bench of the Allahabad High Court [see *William Arthur Forshaw* v. *Eunice Geraldine Forshaw* (1)] that we should not confirm the decree passed by the District Judge.

(1) 3 Ind. Cas. 969; 31 A. 511; 6 A. L. J. 793; 6 M. L. T. 96.

I might be permitted to quote the following from that judgment:

"We are wholly unable to say whether or not the parties have come to terms and arranged their differences. It may be that since the *decree nisi* was passed the petitioner and respondent have co-habited and so the adultery has been condoned." I might further add that it may be that one of the parties has even died after the pronouncement of the decree by the District Court which is now nearly a year old. While I am not prepared to say that we have no jurisdiction to consider this case because there has been no proper reference and there has been no application by the party, I think that the practice might be introduced of requiring an application from the interested party. Most of the Indian Christians are, no doubt, very poor and hence, jurisdiction in divorce matters was given to the District Court, so that the expenses and trouble of going to the High Court of Madras and securing attendance of witnesses there might be avoided. But, in such a momentous matter as confirmation of a divorce, often involving the legitimacy of children, a petitioner might be expected to manifest at least the interest required to apply to the High Court therefor, and if it is too great trouble to go to Madras to put in the application, the rules might provide for his sending it through the District Court.

So much for the preliminary difficulties in this case. On the merits also I am inclined to hold that it is not proved that the respondent has been guilty of adultery. The petitioner (husband) is not at all a straightforward witness, and his story that he caught his wife in adultery with a man (now deceased) in broad daylight in a school house a few days after his marriage is not worth a moment's belief. The respondent is no doubt proved to be a bold, immodest woman. Her talking freely to other males and opening and conducting for sometime a school for adult males do show her to be a coquette and flirt, but I am not prepared to hold that she has lived "the life of a public prostitute" as stated in paragraph 9 of the petition. In fact there is no evidence at all of her having led a life of promiscuous intercourse with all who sought her. [See *Roe* v. *Roe* (2) as to who is a public prostitute]. That the petitioner went to her residence in January 1913 is admitted by the petitioner. He says he had no intercourse with her on that occasion. She says, on the other hand, that he had and she attributes to him the paternity of the child born to her in September 1913, between eight and nine months after this visit. He, no doubt, went to her with mediators in order to persuade her to live with him. I, however, do not think it so very improbable that she did allow him to have intercourse with her at that time, though she refused to return to his place to live with him continuously. I am not prepared to brand the child born to her in September 1913 as a child born of the adultery of its mother with some unknown paramour, having regard to the stringent provisions of section 112 of the Evidence Act. That the mediator witness says that to his knowledge there was no access between the petitioner and the respondent when he went to her in January 1913, is of very little value. In *Atchley* v. *Sprigg* (3), it was said that the presumption of a child's legitimacy can be rebutted "if it is shown by strong, distinct, satisfactory and conclusive evidence that the husband, whether before or after marriage, had not access to his wife." In the *Barony of Saye and Sele* (4), it was held that circumstantial evidence showing that the husband and wife were living separately from each other at such a distance that they could not have had intercourse during the three or four months during which alone the child could have been begotten was sufficient evidence. I do not think that in this case any facts proving non-access beyond reasonable doubt are proved, and I am not prepared on the mere denial of the petitioner to hold that he had no access to his wife in January 1913. I might add that there is clear evidence in this case that the petitioner, who was anxious to get at his wife even in March 1913, has since begun to love another native Christian woman and is, therefore, anxious to get rid of the respondent and

(2) 3 B. L. R. App 9.
(3) (1864) 33 L J. Ch. 345; 3 N. R. 360; 10 Jur. (N. S.) 144; 10 L. T. 16; 12 W. R. 364; 143 R. R. 357.
(4) (1848) 1 H. L. C. 507; 9 E. R. 857.

that he is not a person of much delicacy of feeling. I would, therefore, on the merits also refuse to confirm the decree.

BY THE COURT.—Following the opinion of the majority the decree is confirmed.

Decree confirmed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 100 OF 1913.

February 12, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

GAJADHAR PERSHAD SAHU—PLAINTIFF—APPELLANT

versus

BINDUBASHINI PERSHAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 15—Execution of decree—Personal decree against Hindu woman with limited estate—Debt incurred for legal necessities—Suit based upon allegations of necessity—Decree-holder entitled to prove necessity in execution—Payment of Government demands, whether legal necessity—One of several decree-holders can apply for execution of the whole decree.

Where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who come after her. [p. 182, col. 2.]

In execution of a personal decree against a Hindu woman with a limited interest in the estate obtained upon a plaint expressly alleging the debt to have been incurred for legal necessities, the decree-holder, in order to make the estate liable, is entitled to adduce evidence to prove the necessities for which the debt was contracted. [p. 183, col. 1.]

Government revenue and other Government demands are claims of Government on the land and their payment must be made by the estate and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy these debts. [p. 183, col. 1.]

Any one of the several joint decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. [p. 183, col. 1.]

Appeal against the order of the Subordinate Judge of Mozuffarpore, dated the 14th December 1914.

Babus *Umakali Mukerjee*, *Lakshmi Narain Singh* and *Baldeo Narain Singh*, for the Appellant.

Babus *Mohendra Nath Roy*, *Bulwant Sahay* and *Raghunath Singh*, for the Respondent.

JUDGMENT.

SHARFUDDIN, J.—This is an appeal against the order of the Subordinate Judge of Mozuffarpore, dated the 14th December 1912. The decree-holders are the appellants.

In order to appreciate the arguments addressed to the Court, I think, it is necessary to refer to the salient facts which resulted in the order appealed against.

One Sant Protap had two daughters, one of them was named Manjhuri. She died after the decree. The other daughter had two sons, named Baranashi and Bindubashini. This daughter died leaving the two sons named above. Baranashi, one of her sons, is also dead. After Sant Protap's death, his surviving daughter was the holder of his estate with the limited interest of a daughter. His reversioner was Bindubashini. Manjhuri, as observed before, died after the present appellants had obtained a decree against her and the only surviving reversioner, namely, Bindubashini succeeded to the estate of Sant Protap.

It appears that Manjhuri, during the period she held the estate of her father, entered into business dealings with the appellants, who advanced to her, from time to time, various sums of money for necessary purposes, at least it is so alleged in the plaint. On the 13th October 1893, a document, purporting to be a mortgage-deed, was executed by Manjhuri in favour of the appellants in lieu of the previous debts and also for the purpose of meeting with the legal demands against the estate of her father, as for example, Government revenue and other Government demands. The appellants sued her on that bond and obtained a mortgage-decree on the 1st May 1901. Manjhuri, the judgment-debtor, appealed to this Court. This Court held that the bond could not be treated as a mortgage-bond as no witness was examined to say that Manjhuri had executed that bond in his presence. This Court, on the above ground, gave a personal money decree against Manjhuri on the 14th June 1904.

It appears that some of the plaintiffs of the original suit transferred their share of the decree to Mr. Christian, who did not

join in the application for execution of the decree.

In Execution Case No. 212 of 1912 Gajadhar Prosad and Mahadeo Prosad, two of the the three decree-holders, applied for execution of the decree against Bindubashini, the legal representative of the judgment-debtor, Munjhuri, who died in 1909, and sought to sell the properties which originally belonged to Sant Protap and then held by Bindubashini as the reversioner of Sant Protap. Bindubashini objected to the execution on the ground that the decree having been a personal decree against Manjhuri, the estate of her father was not liable for the satisfaction of the debt incurred by Manjhuri.

The Subordinate Judge held that Manjhuri not having been sued in her representative character and the decree being a personal decree against her, the decree-holders had no right to execute that decree against the reversioner or against the estate left by Sant Protap. He further held that the meaning of section 50, Civil Procedure Code, was that all the decree-holders should join in the application for execution and that as Mr. Christian had not so joined, the application was not maintainable. This order was passed on the 14th December 1912, and it is this order which has been appealed against by the appellants. It appears from the order of the Subordinate Judge that the appellants applied to him to adduce evidence to prove that the debts incurred by Manjhuri were for legal necessities. The Subordinate Judge did not allow this, on the ground that this would be making a new case in the execution department which was not the case in the plaint and that there was no issue framed with regard to legal necessities.

We are asked in this appeal to consider whether any new case was attempted to be set up by the appellant and to hold that the estate of Sant Protap was bound to satisfy the debts, as they were incurred for legal necessities. In order to discuss whether the appellant desired to set up a new case not made out in the plaint we have to advert to the plaint itself. In paragraph 2 of the plaint there is an allegation in most distinct terms that the debts were incurred by Manjhuri to pay off the debts due to other creditors, which Manjhuri contracted for paying the Government revenue and other Government demands and for meeting other necessary and legal expenses. It is, therefore, clear that the question was raised in the plaint, but a plaintiff cannot have questions decided unless the allegations are disputed. Manjhuri had no motive to dispute the allegation. If she had to pay, it made no difference to her whether the estate would have to pay after her death or not. For this very reason it seems that no issue was framed, but the question of legal necessity was no doubt raised in the plaint.

The decree against Manjhuri was a money decree and a personal decree and hence the question resolves itself into this: either Manjhuri borrowed for legal necessities or she did not. If she did, the loan bound the estate and the respondent Bindubashini is her legal representative. If not, the loan was a private loan and the respondent is not her legal representative.

The question whether the respondent is her legal representative or not, comes within the provisions of section 47, Civil Procedure Code.

This question again turns on the further question whether the loan was for legal necessities. This question has never been decided.

It is settled law that where the suit is founded upon a purely personal debt or contract of a Hindu woman with a limited interest in the estate, the estate is not bound to satisfy that debt. In order to bind the estate the suit should be so framed as to show that it is not merely a personal demand on the female in possession, but that it is intended to bind the entire estate and the interests of all those who came after her. We have already observed that the suit in the present case was so framed, and the basis of that suit against her was that the estate which she held was bound and that she was compellable to pay not out of her own assests, but out of the estate. This is clear from paragraph 2 of the plaint. A Hindu woman who succeeds as heir, whether to a male or to a female, has not complete dominion over the property inherited by her, so as to enable her to alienate it otherwise than in case of necessity. This is no doubt the law, but there can be

no doubt that the Government revenue and other Government demands are claims of Government on the land and the payment must be made by the estate, and if these payments cannot be made out of the income and money has to be borrowed to make them, the estate is liable to satisfy those debts. In the above circumstances, I am of opinion that the appellants are entitled to adduce evidence to prove the legal necessities for which the debt was contracted.

In disposing the application of the decree-holder the Subordinate Judge has referred to section 50 of the Civil Procedure Code and has held that all the decree-holders should have joined in the application for execution, but this is not so as Order XXI, rule 15, provides that if there are more than one decree-holder, any one of them may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. It is admitted that the execution in the present instance was applied for by two out of three decree-holders for the whole decree.

In the above circumstances, I am of opinion, that this case should be remanded to the lower Court, with a direction that both parties should be allowed to adduce evidence on the point whether the debt incurred by Manjhuri was or was not for legal necessities. If this is found in the affirmative Bindubashini must be held to be the legal representative and execution must proceed against him. If it is not found in the affirmative, the application must be refused. Costs will abide the result. Hearing fee five gold *mohurs*.

COXE, J.—I agree.

Case remanded.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 119 OF 1913.

March 11, 1915.

Present:—Sir John Wallis, KT., Chief Justice and Mr. Justice Tyabji.

DEVARASU VENKATACHALA DWARAKA NADHA RAO, MINOR, BY MOTHER AND NEXT FRIEND NARASUBAYAMMAH—PLAINTIFF—APPELLANT

versus

DEVARASU VENKATARAO PANTULU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition not by metes and bounds, effect of—Tenants-in-common—Adverse possession—Relinquishment—Ouster—Evidence of exclusion—Limitation Act (IX of 1908), Sch. I, Art. 127.

Where the members of a joint undivided Hindu family are divided in status, but do not effect a division by metes and bounds, they are tenants-in-common and the possession of one such tenant enures to the benefit of another, unless such another is shown to have renounced his share of the property in possession of the tenants-in-common or there has been something amounting to his ouster. [p. 183, col. 2.]

Where no ouster is proved there cannot be said to be an "exclusion" from joint family property within the meaning of Article 127, Schedule I of the Limitation Act. [p. 184, col. 1.]

Ramachandra Narayan v. *Narayan Mahadev*, 11 B. 216, dissented from.

Sammantha Gramany v. *Devasikamany Gramany*, 5 Ind. Cas. 924; 20 M. L. J. 364; 7 M. L. T. 174; (1910) M. W. N. 511; *Sellam* v. *Chinnammal*, 24 M. 441; *Dhoorjetti Subbayya* v. *Doorjetti Vankayya*, 30 M. 201; 2 M. L. T. 184, followed.

Where one of the members of a co-parcenary was shown to be in possession of the house site and he erected upon it a superstructure, the proper decree to be passed is to allow him to retain the house site and direct him to pay its price to the other co-sharer who claims a share in the house site alone. [p. 184, cols. 1 & 2.]

Appeal against the decree of the District Court of Krishna at Masulipatam, in Original Suit No. 2 of 1912.

Mr. *V. Ramadoss*, for the Appellant.

Mr. *P. Nagabhushanam*, for Respondents Nos. 1 and 2.

JUDGMENT.

WALLIS, C. J.—In this case the plaintiff appeals from a decision of the District Judge in a partition suit refusing him a share of a certain site on which the family house formerly stood. The family house was washed away by the great cyclone in the sixties and another house was subsequently constructed by the defendants. The plaintiff does not claim any share in the superstructure, but claims that in the partition he is entitled to a share of the site.

The District Judge has relied on a variety of circumstances showing that the plaintiffs had abandoned their right. The proper principle to start with, in our opinion, is that assuming, as found by the District Judge, that shortly after the cyclone the parties became divided in status, yet that until there was a partition by metes and bounds they would be in possession as tenants-in-common of what had been the oint family property, and with regard to he tenants-in-common the presumption is hat the possession of one is the possession

of all, and, therefore, the possession of the defendants would enure for the benefit of the plaintiff at any rate, unless it were shown either that the plaintiff had renounced his share of the property in possession of the tenants-in-common or possibly that there had been something amounting to ouster.

Now, looking at the case from this point of view, there is oral evidence of three witnesses, who say they remember long ago that the plaintiff's grandfather said that he renounced his share of the family house. This is not the evidence upon which the District Judge has acted in arriving at the finding he has arrived at and we do not think it is evidence on which it would be safe to act, and, therefore, it comes to this,—that as there is no evidence of anything that could be considered as ouster, the possession of the defendants must all along be considered to have been the possession of their tenants-in-common.

Then it is said that the suit is barred by limitation under Article 127 of the Limitation Act. But if the possession of the defendants is considered to be the possession of the plaintiff, it cannot be said that there has been exclusion of the plaintiff within the meaning of the Article. A case to the contrary has been cited, *Ramachandra Narayan* v. *Narayan Mahodev* (1), that the exclusion of the plaintiff within the meaning of the Article should be presumed by the defendants having been in possession. But as observed by Benson and Krishnasawmi Iyer, JJ., in *Sammantha Gramany* v. *Devasikamany Gramany* (2), the observations of West, J., in that case have not been accepted as a sound interpretation of Article 127 in this Court, citing *Sellam* v. *Chinnammal* (3) and *Dhoorjetti Subbayya* v. *Dhoorjetti Venkayya* (4). We are, therefore, not prepared to follow those observations and we hold that on the evidence here, there is nothing to show that the plaintiff was in law excluded within the meaning of the Article. As, however, the defendants have been allowed to occupy this site for so long and as the relations of the parties do not appear to be very good, we think it will be best to direct that in the final decree the whole site should be allotted to the defendants and that, as now agreed, Rs. 388 should be paid by the defendants to the plaintiff in lieu of the plaintiff's share of the house and site.

With regard to costs, we think that as there was dispute about this house site the plaintiff was obliged to bring his suit and as he was obliged to bring his suit, he was obliged to include the whole of the joint family properties, and that each party should bear his own costs in the Court below. Both parties should pay and receive proportionate costs of this appeal.

TYABJI, J.—I agree.

Appeal partly allowed.

(1) 11 B. 216.

(2) 5 Ind. Cas. 924; 20 M. L. J. 364; 7 M. L. T. 174; (1910) M. W. N. 511.

(3) 24 M. 441.

(4) 30 M. 201; 2 M. L. T. 184.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 69 of 1914.

March 5, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

TADIBOYINA PEDA PUNNAYYA—DEFENDANT No. 1—APPELLANT

versus

DEBBAKUTTI KATTAMMA, MINOR, BY MATERNAL AUNT AND NEXT FRIEND VEERA NAGAMMA AND OTHERS—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Hindu Law—Stridhanam—*Property acquired by a woman without aid from funds from her husband or third party—Devolution—Daughter preferential heir to son.*

Where a woman purchased certain immoveable property and paid the purchase-money by mortgaging the same and subsequently redeemed it:

Held, that the property was acquired by her wits and was her *stridhanam* property and, therefore, devolved on her daughter in preference to her sons. [p. 186, col. 2; p. 187, col. 1.]

Subramanian Chetty v. *Arunachelam Chetty*, 28 M. 1, followed.

Debi Mangal Prosad Singh v. *Mahadeo Prasad Singh*, 14 Ind. Cas. 1000; 9 A. L. J. 263; 11 M. L. T. 217, 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 34 A. 234; 39 I. A. 121, distinguished.

Second appeal against the decree of the District Court of Guntur, in Appeal Suit No. 410 of 1912, preferred against that of the Court of the District Munsif of Tenali, in Original Suit No. 504 of 1911.

Mr. *P. Narayanamurthi*, for the Appellant.
Mr. *V. Ramesam*, for the Respondents.

JUDGMENT.

AYLING, J.—The plaintiff in this case (1st respondent) sued to set aside a deed of exchange, dated 1st June 1911, executed by her father (2nd defendant) in favour of the 1st defendant (appellant) in respect of certain lands, the property of her (plaintiff's) deceased mother, Subbamma, and which she claims by inheritance as the latter's heir. The District Munsif dismissed the suit on the ground that the property passed on the death of Subbamma not to the plaintiff, but to plaintiff jointly with her brothers who are no parties to the suit, and that the suit was not maintainable by the plaintiff alone. The District Judge, differing from the Munsif, held that the plaintiff alone succeeded to the property on her mother's death and finding the other disputed point in favour of the plaintiff, gave her a decree.

The sole question argued before us is, whether the plaintiff is the sole heir of her mother in respect of the plaint property and as such entitled to maintain the suit alone.

Subbamma purchased the property on the 27th September 1905 by Exhibit B for Rs. 200, which appears to be very much less than its real value. She raised the sale price by means of a mortgage of the very same property. This sounds somewhat improbable; but it is the finding of the District Munsif which was not questioned either in the lower Appellate Court or before us and we must take the facts to be so. The plaintiff's mother in effect acquired this property by her wits: and it must, in my opinion, be regarded as her separate acquisition.

The question is whether property so acquired descends to her daughter in preference to her sons in accordance with the method of devolution laid down in Chapter II, section 11, clauses 12 and 13, of the *Mitakshara*; or, in other words, whether it comes under what Mr. Mayne called the mysterious word "adyam" in the text of Yajnavalkya therein dealt with.

The leading case on the point in this Presidency is the Full Bench decision *Subramanian Chetty* v. *Arunachelam Chetty* (1). The property in that case had been acquired by a widow by means of savings out of monies received by her under a maintenance decree, and it was held to descend to the widow's own heirs in the female line, just as if it were a *stridhanam* in the narrowest sense of the term.

The present case is, of the two, the stronger from the plaintiff's point of view. The learned Vakil for the appellant in fact admits that if the above ruling is followed our decision must go against him; but contends that its authority has been destroyed by a later decision of the Privy Council reported as *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2), on which he himself relies.

Now the decision in *Subramanian Chetty* v. *Arunachelam Chetty* (1) seems to me to be entitled to the very greatest weight. It was that of a Full Bench of this Court, the main judgment being delivered by a very eminent Hindu Judge, then officiating as the Chief Justice. The question was evidently most elaborately argued by Vakils on both sides of quite phenomenal ability and repute. The decision has been followed ever since and was based on the *Mitakshara*, universally recognised as the leading authority in this part of India. I do not think we should be justified in departing from the principles laid down in this decision, unless it is quite clear that adherence to it would be counter to the view taken by an even higher tribunal.

A careful consideration of the judgment of the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2) does not seem to me to necessitate anything of the kind. The question for decision in that case was thus propounded by Lord Robson who delivered the judgment (page 238): "whether immoveable property obtained by a Hindu widow on partition under the *Mitakshara* Law is part of her *stridhanam* in the narrow sense of that word, indicating her separate property or peculium which passes on her death to her own heirs; or is merely part of her *stridhanam* in the wider sense in which the word is sometimes used, as indicating any property in which she may have some right of proprietorship."

Such a question could never arise in this Presidency where the custom of allowing a share on partition to the wid w of

(1) 28 M. 1.

(2) 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121.

a deceased co-parcener does not obtain; the effect of this decision was simply to place property thus acquired by a widow on the same footing as regards devolution of property acquired by inheritance. That property acquired by inheritance is an exception to the general rule laid down by Vignaneswara is recognised by Subramania Iyer, officating Chief Justice in the Full Bench case.

Reliance is placed by appellant's Vakil on the general remarks regarding Chapter II, section 11, of the *Mitakshara* to be found on pages 239 and 240 of the report. The effect is simply this. Their Lordships say that Yagnavalkya's language is open to the meaning that a woman's property *of whatsoever kind* descends always to her own heirs. They say: "It is difficult to adopt the latter construction in view of the undoubted fact that, as Sir Arthur Wilson said in delivering the judgment of their Lordships' Board in *Sheo Shankar Lal* v. *Debi Sahai* (3), 'most of the old commentators recognise, with regard to the property of a woman, whether called *stridhanam* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition.'"

Now the Full Bench decision of this Court does not by any means proceed on the construction that a woman's property, of whatever kind, always descends to her heirs; as already pointed out, one important exception (property acquired by inheritance) is specifically recognised. On the other hand, their Lordships of the Privy Council do not go so far as to say that the dictum of Vignanesvara regarding property derived from the additional sources specified in clause 2 of the section is devoid of authority. Then in the course of their judgment they are careful to explain the very limited question for their determination (the devolution of a woman's property acquired by partition) and as I understand them, they go no further in the passage relied on than to point out that the *Mitakshara* passage should not be regarded as an authoritative and conclusive rule of law placing all kinds of woman's property on the same footing as regards devolution. What their decision would have been regarding the devolution of property acquired in the way the suit property was acquired, it is impossible to say. I, therefore, am of opinion that the Privy Council decision is no authority for refusing to follow the ruling in *Subramanian Chetty* v. *Arunachelam Chetty* (1).

I would, therefore, dismiss the second appeal with costs.

TYABJI, J.—The question in this appeal is whether the plaintiff, who is the daughter of one Subbamma, is entitled to the property referred to in the plaint as against her brothers. It has been argued before us with reference to the questions (1) whether the property must be considered to be the *stridhanam* property of the said Subbamma and (2) whether the incidents annexed to this property, so far as devolution and succession are concerned, must be determined by the rules prevailing in regard to *stridhanam* property or whether some other rule of succession must be applicable to it.

The property in question was, it is admitted, acquired by Subbamma without the aid of any funds derived either from her husband or from any third party. It has been found that she purchased it and paid the purchase-money by means of a loan secured on the mortgage of the very property which she purchased, and that subsequently the loan was paid off and the mortgage redeemed.

The texts relating to *stridhanam* property have often been the subject of interpretation, and they have recently been considered by the Privy Council in *Debi Mangal Prosad Singh* v. *Mahadeo Prasad Singh* (2). The argument before us has been that the property in question cannot be considered to be the *stridhanam* property of Subbamma, inasmuch as it does not fall within any of the six specified clauses of what has been termed strict *stridhanam*. It is beyond dispute that the property was not given to Subbamma by (1) the father, (2) the mother, (3) the husband or (4) a brother or (5) received by her at her nuptial fire, (6) or presented to her on her husband's marriage to another wife; and the only question is whether it can fall under the final word "adayam" occurring in Yajnawalkya's description of *stridhanam*, which word, in the light of judicial interpretation, may be rendered as "and the like". The argument for the appellant has been that the interpretation of that expression

(3) 25 A. 468; 5 Bom. L. R. 828; 13 M. L. J. 330; 7 C. W. N. 831; 30 I. A. 202 (P. C.).

"adhyam" or "and the like" by *Mitakshara* cannot now be accepted, that as that interpretation has been made to include property acquired in five different modes, namely by (*a*) inheritance, (*b*) purchase, (*c*) partition, (*d*) seizure or (*e*) finding, and as there are decisions [See *Sheo Shankar Lal* v. *Debi Sahai* (3)] binding upon this Court that property acquired by a woman by inheritance and by partition does not form her *stridhanam* in such a sense that on her death it passes to her *stridhanam* heirs in the female line to the exclusion of males—therefore it must follow that property acquired in any of the three modes referred to by the author of *Mitakshara* is not *stridhanamt* and in particular that property acquired in the mode in which Subbamma acquired her property should also be excluded from *stridhanam* property in the said sense.

The real question before us, however, seems to be, what is the rule of succession applicable with reference to this property of which Subbamma died possessed. It seems to me that the decisions holding that, where a woman has inherited property or acquired it in the course of partition she does not form a stock of descent, but that she is to be considered to have held it as limited owner and that succession is to be traced again as from the last full owner—decisions to that effect are not sufficient to form the basis on which we ought to proceed for the purpose of the decision in the present case.

In *Subramanian Chetty* v. *Arunachelam Chetty* (1) the underlying principle is more than once suggested, or I might say assumed, to be—whether the property in question was at the absolute disposal of the woman. On page 5 Sir Subramania Iyer says: "In the absence of any clear provisions of Hindu Law, defining the character of her interest in the income, it must, on general grounds, be held that what becomes vested in her in her own right and what she can dispose of at pleasure is her own property, not limited but absolute, exclusive and separate in every sense and devolving as such." On the other hand on page 6 he says: "No doubt it is now settled that, notwithstanding Vignaneswara's authority, property inherited by a female from a male or a female would not pass to her own heirs, that is to say, the woman so inheriting takes a limited and qualified estate with reverter annexed to it."

If this be the principle, then it is possible to understand and reconcile the decisions restricting property which may be described as *stridhanam* property excluding, therefore, such property as a woman has inherited or acquired by partition; for in the case of property acquired by inheritance or partition, it may be assumed on general principles that it was intended that the woman should take only a limited interest therein and that after providing for her maintenance thereout during her life-time, it should revert to the heirs of the last full owner.

With reference to the property now in question, however, it is difficult to see how it can be said to revert, inasmuch as Subbamma cannot, by any stretch of the principle to which I have just alluded, be considered to have acquired this property only with limited rights, nor can the rights of any third person be so extended as to allow of our proceeding on the basis that during the life of Subbamma they had even any inchoate right in the property.

In this connection the following text and comment on it taken from *Subramanian Chetty* v. *Arunachelam Chety* (1) is particularly pertinent: "Still more to the point," says Sir Subramania Iyer, "is the text of Devala: 'Her subsistence, her ornaments, her perquisites and her *gains* are the separate property of a woman.' This is quoted and relied in the Digests of Bengal, Benares and Southern Schools such as the Daya Bhaga (Chapter IV, section , verse 15), the Viramitrodaya (Chapter V, part I, section 7), the Madaviya (Burnell's Translation, page 46) and the Saraswati Vilasa (Foulke's translation, section 276, page 57). Compare also the Smrithi Chandrika, Chapter IX, section I, placita 6 to 10. This text is certainly not to be confined, as suggested on behalf of the defendant, to gifts for maintenance made out of affection, for, as pointed out by Dr. Jolly (Hindu Law of Partition, Inheritance and Adoption, page 235), the Sanskrit term Vritti (subsistence) in the text has been understood by commentators to include what is given by the heirs, and in *Manilal Rewalut* v. *Bai Rewa* (4) arrears of maintenance

(4) 17 B. 758.

recovered by a wife under a decree against her husband were held to be *stridhanam*, though *aparibhashika stridhanam* with reference to the distinctions peculiar to *Mayukha*."

What then is the rule of succession applicable to property which must be taken to have been the absolute property under the control of a woman governed by Hindu Law—property with reference to the succession to which it was conceded before us that the woman must be taken to be the stock of descent? It seems to me that for the reasons indicated in *Subramanian Chetty* v. *Arunachelam Chetty* (1), in the case of property found to be the absolute property of a woman under her entire unfetttered control there ought to be only one rule of succession recognized in Madras, namely, the rule of succession with reference to *stridhanam* property. The learned Pleader for the appellant had very great difficulty in suggesting any other rule as being applicable. It was impossible for him not to concede that Subbamma must be taken to be the stock of descent and his argument could, therefore, be only treated on the basis that Subbamma's heirs must be taken to be her sons either in preference to, or conjointly with, her daughter. It seems to me to be impossible to give effect to a rule of law which cannot even be stated with certainty by the person who desires to rely upon it. The only authorities that could be cited in favour of the nebulous suggestion made by the appellant were drawn from Bombay and based on the *Mayukha*—a text which, it is admitted, is not prevalent in Madras. This fact and the great weight due to *Subramanian Chetty* v. *Arunachelam Chetty* (1) enable me to omit from consideration the decisions given by the Bombay High Court, although Westropp, C. J., and West and Telang, JJ., took part in those decisions, *Vijiarangam* v. *Lakshman*(5), *Manilal Rewadut* v. *Bai Rewa* (4).

For the reasons that I have given, I am of opinion that the lower Appellate Court was right in applying the *stridhanam* rule of succession to the property in question, and agree, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

(5) 8 Bom. H. C. R. 244.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 36 OF 1913.

February 25, 1915.

Present:—Sir John Wallis, KT., Offg. Chief Justice, and Mr. Justice Coutts-Trotter.

VENKATARAMANNA—DEFENDANT No. 2 —APPELLANT

versus

K. J. VENKATAPATHI NAYANI VARU, MINOR, BY HIS AGENT AND NEXT FRIEND D. VASUDEVA ROW—PLAINTIFF— RESPONDENT.

Grant—Kayam patta—*Construction — Surrounding circumstances and conduct of parties.*

Where a grant under the heading *kayam patta* was made in 1857 and the grantees dealt with their tenants as if they were entitled to permanent rights and in compensation for acquisition of land for public purposes the grantee and grantor both shared and evidence proved that the grantor regarded the grant in the terms of neighbouring villagers as a permanent grant:

Held, that a heritable permanent grant was conveyed in those terms. [p. 190, col. 2.]

Wallis, C. J.—*Prima facie* the words "*kayam patta*" mean 'perpetual lease.' But a long course of decisions have held that these words and the words "*istimrari mokurari*" and "*kayam sasvata*" do not *prima facie* convey more than life-estates. When land or interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson' or 'from generation to generation' or the like. In construing grants one has to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant. [p. 189, col. 1.]

Coutts-Trotter, J.—In *Tulshi Pershad Singh* v. *Ram Narain Singh*, 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar. P. C. J. 646, the Privy Council have expressly used those words to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction. [p. 190, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge of North Arcot in Original Suit No. 79 of 1911.

Mr. *L. Venkataraghava Aiyar*, for the Appellant.

Mr. *S. Swaminadhan*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—This case is one of some difficulty and rather on the line, but after hearing the very full arguments of the Counsel on both sides we have come to the conclusion that we cannot support the decision of the Subordinate Judge.

The question is as to whether the terms of Exhibit A amounted to a permanent

grant. The words used are "*kayam patta*" which are translated as 'perpetual lease.' *Prima facie*, of course, these words would be taken to mean what they say. But there is a long course of decisions, mostly in cases arising in Northern India but treated by this Court as applicable also to this part of India, that having regard to the general usage of the country such words as these and the words "*istimrari mokurari*" do not *prima facie* convey more than life-estates. That doctrine was applied to this part of India and to a term similar to that in the present case in *Rajaram* v. *Narasinga* (1). The term there was "*kayam saswata patta*" which is even stronger, as the word *saswata* is not used here, and yet the Court consisting of Parker and Shephard, JJ., held that it did not convey a permanent right, and in *Foulkes* v. *Muthusami Goundan* (2), Subramania Aiyar and Moore, JJ., did not differ from the law as there laid down. They say "It is quite true, as urged for the appellant, that when land or even an interest in land is intended to be transferred hereditarily, it is usual to indicate that intention by the use of the words 'from son to grandson,' from 'generation to generation' or the like. In the present instance, however, there was no transfer of land or an interest in land, but only an agreement as to the rate at which assessment was to be paid in respect of lands in which the party bound to pay the assessment admittedly already possessed a heritable estate." They accordingly distinguished the case before them on that ground. But while that is the general principle, at the same time it has been again and again laid down by their Lordships of the Judicial Committee that we are to look to the surrounding circumstances and to the conduct of the parties to see what their real intention was in the grant. For that proposition it is only necessary to refer to the decision *Tulshi Pershad Singh* v. *Ram Narain Singh* (3). On page 130 their Lordships say: "After this review of the decisions, their Lordships think it is established that the words *istimrari mokurari* in a *pattah* do not *per se* convey an estate of inheritance, but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have had in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronoance that the grant was perpetual." The question which is one of some difficulty with which we are faced here is to decide whether the subsequent conduct of the parties is sufficient to enable us to say that the grant was perpetual, and we think that on the whole that question must be answered in the affirmative. The grant was made in 1857 and there are a number of documents, Exhibits I, IV and VIII, which would not perhaps be of very great value if they stood alone, showing that the grantees dealt with their tenants as if they were entitled to permanent rights. Then we have Exhibit IX of the year 1879 which is a mortgage by the grantee to the grantor for Rs. 700. It is said that it may have been the life-interest only of the grantee that was mortgaged; but that is by no means apparent, when we consider this grant with the further documents which have been referred to. We have Exhibit B of the year 1895, which is a document of compromise between the grantor and the grantee and his sons; and in that document it is distinctly statedthat the grantee has a permanent right. Not only is the grant spoken of as a permanent grant, which expression would scarcely have been used by the *zemindar's* people so soon before the right of redemption was likely to fall in if they denied the permanent character of the grant, but also there is this stipulation: "Out of the Rs. 80, the permanent total yearly amount of demand which you have to pay, every year we shall remit permanently at the rate of Rs. 40 a year." In "which you have to pay" the plural 'you' is used, and in a document from a superior to an inferior suggests that it applied both to the grantee and his sons. Then we have Exhibits XV and XV (*a*) which show that when certain of these lands were acquired for public purposes, the compensation was paid to the grantee and that grantor and his heirs made no claim to any share in it. But stronger than all these is the evidence as to the way in which the grantor regarded grants in these

(1) 15 M. 199.
(2) 21 M. 503; 8 M. L. J. 207.
(3) 12 C. 117; 12 I. A. 205; 9 Ind. Jur. 433; 4 Sar P. C. J. 646.

terms of neighbouring villagers. Exhibit VI is a purchase by the grantor from the grantee under Exhibit V, which is similar in terms to the present document. It is sought to suggest now that this was a purchase only of the life-interest of the grantee; but there is nothing in the document to support that suggestion. Then we have a still stronger instance in Exhibits XVII and XVII (*a*). Under Exhibit XVII a representative of the grantee sold a share in the village to a third party and under Exhibit XVII (*a*) the heir of the grantor in the year 1892, that is, forty years after the date of the grant in question, purchased that part of the village which had been alienated under Exhibit XVII. It is immaterial whether the original grantee was dead, as he most probably was at that period, because forty years after the grant his expectation of life must be very small in this country and not worth purchasing. It is, we think, exceedingly significant, as showing the way in which these grants were regarded by these people, that the grantor's heirs should have purchased back part of the grant. On the whole I think there is sufficient in the subsequent conduct of the parties to take the case out of the rule which is laid down in *Rajaram* v. *Narasinga* (1) and I would, therefore, reverse the decree of the Subordinate Judge and dismiss the suit with costs throughout.

COUTTS-TROTTER, J.—I agree. I should only like to add this. I think the language which their Lordships of the Privy Council employed in *Tulshi Pershad Singh* v. *Ram Narain Singh* (3) was expressly used in order to leave the Courts free to give the fullest effect to the circumstances of each case and to avoid laying down any hard and fast rule of construction; and I think we are carrying out the intention of their Lordships in giving full effect to the surrounding circumstances of the case.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 429 OF 1913.

April 7, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

GHASI RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat DEBI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Gift in favour of one member of family—Property treated as joint property—Burden of proof—Donee's marriage expenses met out of joint funds—Lien on gifted property.

Prima facie a property acquired under a gift by one member of a joint Hindu family belongs exclusively to him; if other members of the family allege that it was treated as joint family property it is for them to prove it. [p. 191, col. 2.]

The fact that the expenses of the marriage of that member of the family, in whose favour the gift had been made, were met out of the joint family funds, gives the joint family no lien on the gifted property. [p. 191, col. 2.]

First appeal from the decision of the Subordinate Judge of Agra, dated the 18th June 1913.

Mr. *S. K. Dar*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—The genaological tree which is set out in the judgment of the Court below will explain the relationship between the parties. The plaintiffs are some of the members of the family of Chiranji Lal. They sue as against *Musammat* Debi, the widow of Narain and mother of Gopal Das. and they also implead other members of the family who have not joined them in the suit. Their case is that the family was joint family and that the property situated in the three villages Baranda, Marhakar and Garhi Chandraman is the joint family property, that *Musammat* Debi as widow of Narain and mother of Gopal Das had no title whatsoever to any share therein, that she only had a right of maintenance, that her name was entered in the Government records for the purpose of consolation only, that by reason of that entry she had sued for and obtained a decree for profits of a portion of the estate and that she had applied for partition of another portion. The plaintiffs, therefore, came into Court asking for a declaration that the property was the property of the joint family and the defendant, *Musammat* Debi, had no title

whatsoever thereto. In asking for this relief the plaintiffs also said that if in the Court's opinion they were not in legal possession of the property, then the Court might put them into possession and that they were ready and willing to pay the Court-fee in respect thereto. *Musammat* Debi's defence was that her husband, Narain, had separated from his brother in his life-time, that she held the properties of Baranda and Marhakar as the mother of a separated Hindu. In regard to the property of Garhi Chandraman she pleaded that the property was her *stridhan*, that at the time of her marriage her grand-mother and brother had gifted this property to her, but that the deed of gift was executed in the name of her husband, Narain, in whose name the property stood and after him in the name of Gopal Das, his son. She also pleaded that the plaintiffs were not in possession and were not entitled to a declaration in view of the terms of section 42 of the Specific Relief Act. Four issues were framed, one as to the value of the property with which we are not concerned. Issue No. 2 is whether section 42 is a bar to the suit. Issue No. 3, is the property in suit joint property of the parties or separated property? Issue No. 4, did defendant get Garhi Chandraman property from her mother and her brother and is it ancestral property? The defendant gave evidence as to the alleged separation. The Court below rejected that evidence as valueless and held that the family was a joint family. In respect to the properties in Baranda and Marhakar it held that they were joint family property. In respect to the property in Garhi Chandraman it held that this property had been gifted to Narain, that it was his separate property, that it descended to his son and from his son to the defendant, *Musammat* Debi. It held, that by reason of the decree for profits which *Musammat* Debi had obtained (which profits had been paid by the plaintiffs) and also by reason of the fact that Garhi Chandraman was in the possession of the defendant and not of the plaintiffs, that the plaintiffs' suit for declaration was barred by section 42 of the Specific Relief Act and, therefore, it dismissed the suit *in toto*. The plaintiffs have come here on appeal. It is urged that in view of the circumstances of the case and the fact that the plaintiffs are what has been termed collecting co-sharers *i.e.*, co-sharers who collect the income from the tenants, that it was unnecessary for the plaintiffs to sue for anything else beyond a declaration at least in respect to the two villages, Baranda and Marhakar. It is urged that even if that were necessary, the plaintiffs had all along been perfectly willing to pay necessary Court-fees and that their suit ought not to have been dismissed without giving them a chance of paying the necessary fee. In regard to Garhi Chandraman it is urged that as the gift to Narain had been made at the time of the marriage, the property belonged to the joint family because the expenses of the marriage had been met out of joint family funds. On behalf of the respondent it has been urged that the evidence on the record clearly proves the separation of Narain from his brother and that on this ground also the plaintiffs' suit ought to have been dismissed. In so far as the actual facts are concerned, we have no hesitation whatsoever in agreeing with the Court below that the alleged separation between Narain and his brother is not proved. A perusal of the evidence is quite sufficient to show that the statement of the witnesses is not worth the paper on which it is written. The presumption is in favour of jointness and it was for the defendant to prove the alleged separation. In our opinion she has utterly failed to do so. In regard to the village Garhi Chandraman we cannot accept the argument which is now put before us. The gift was clearly a gift in the name of Narain. The fact that Narain's marriage expenses were met out of joint family funds gave the joint family no lien on the gifted property. Of course it was perfectly possible for this gifted property to have been treated by the family as such. But if this were the case it was the plaintiffs' duty to prove it by evidence. *Prima facie* the gift to Narain made Narain the sole owner of the property, which would descend to his son and on his son's death to his widow. *Prima facie* it was not joint family property at all. It was for the plaintiffs to prove that it had been treated as such. But on that point they have not given any evidence whatsoever. In regard to this village we are of opinion that the decision of the Court below was perfectly correct.

There remains the question of section 42 of the Specific Relief Act in respect to the villages Baranda and Marhakar. *Musammat* Debi sued for her share of the profits of one of these villages Her name being recorded in the Government papers the Revenue Court was bound to decree her claim. The fact that she sued is an admission that the opposite party was collecting the income of the property. Therefore, in so far as legal possession of a *zemindar* is concerned, the actual possession was in the hands of the plaintiffs. We do not think that the mere fact that *Musammat* Debi sued and obtained her share of the profits from the opposite party would be sufficient reason for forcing the plaintiffs to bring a suit for possession. The question of title could only be decided in one way in the Revenue Court by reason of the provisions of the Tenancy Act. Otherwise it would have been open then to the plaintiffs to contest *Musammat* Debi's title to the share which stood in her name. This is one of those cases in which it is difficult to say which party is in possession. But in any case the action of the lower Court was wrong in dismissing the suit in view of the fact that the plaintiffs had in their plaint offered to pay the necessary Court-fee. In the circumstances of the case, however, we are of opinion that it was unnecessary for the plaintiffs to sue for anything more than a declaration. The result, therefore, is that the plaintiffs' suit will be decreed in respect to the properties in *Mouzas* Baranda and Marhakar *i.e.*, the declaration for which they ask is granted. In regard to the property of Garhi Chandraman the suit will stand dismissed. Parties will pay and receive costs in proportion to failure and success in both Courts.

Appeal partly allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 282 OF 1912.

March 2, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

NAGAR DAMODAR SHANBHOGUE—PLAINTIFF—APPELLANT

versus

GUDLIMAR RAMA RAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Presidency Banks Act (XI of 1876), *s.* 371, *scope of —Third parties cannot take advantage—Directors, agents or trustees--Security to cover future advances, whether void—Provision merely directory.*

Section 37 of the Presidency Banks Act XI of 1876, must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors of a Presidency Bank act in disregard of those powers they render themselves liable to the Bank for any loss that it may sustain by unauthorised acts. The section does not enable third parties, with whom contracts have been entered into, to deny their liability to the Bank if the Bank chooses to act upon the contract of its Directors. The action of the Directors under such circumstances will not be *malum prohibitum*. [p. 193, col. 1.]

The Directors are not identical with the Bank. They fill a double character, (1) as agents of the Bank, (2) as trustees for shareholders of the power committed to them. Whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations. [p. 194, col. 2; p. 195, col. 1.]

The action of the Directors in taking the security to cover future advances, although it may be in excess of their powers, is not void *ab initio*. It is open to the Bank to have accepted such contract. [p. 194, col. 1.]

If a prohibition is in the interest of the shareholders and is based on considerations of public policy it must be regarded as *malum prohibitum*. [p. 194, col. 1.]

Under the Presidency Banks Act it is not the Bank that is prohibited from taking security in regard to future advances in the shape of immoveable property, but only the Directors. Section 37 only contains instructions to the Directors as to how they should manage the business of banking. [p. 194, col. 2.]

It is well settled that where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transaction void altogether. Section 37 is only directory of the powers of the Directors. [p. 194, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of South Canara, in Original Suit No. 30 of 1911.

Messrs. *K. P. Madhava Rao*, *B. Sitarama Rao* and *K. P. Lakshmana Rao*, for the Appellant.

Mr. *K. N. Aiya*, for the Respondents.

JUDGMENT.—The defendants Nos. 1 to 4, the father of defendants Nos. 4 to 6 and the 6th defendant executed to the Bank, the 12th defendant in this case, a deed of mortgage (Exhibit E on the 5th August 1898. The property was to be regarded as security for a sum of Rs. 54,000—already advanced to the defendants, and "for other credits and advances" which may be made to them from time to time. Payments were made towards the debt. On the 2nd June 1905 the Bank transferred the balance due to it from the defendants to the plaintiff under Exhibit A. The plaintiff sued under the assignment. The defendants admitted the execution of Exhibit E, but pleaded payment in full before the date of the transfer. There were subsidiary pleas of limitation with reference to portions of the claim. The defendants also contended that the document, Exhibit E, cannot be sued upon, as it was made to secure future advances. The Subordinate Judge came to the conclusion that the claim was based upon an invalid document, and dismissed the plaintiff's suit.

In appeal it has not been argued by the appellant that the Directors had power under the Presidency Banks Act, XI of 1876, to take a security upon immoveable property or in respect of future advances, as it was not necessary for the disposal of the appeal. The main contention pressed before us was that the limitations on the powers of the Directors only affected the relationship *inter se* between them and the Bank and that even if the Directors exceeded their powers, the transaction entered into by them would not be illegal. Section 36 of Act XI of 1876 defines the scope of banking transactions and enumerates the various powers conferred upon a Bank. Section 37 deals with the duties of the Directors of the Bank. In our opinion section 37 must be regarded as containing instructions for the guidance and governance of the Directors and as defining the powers exercisable by them. If the Directors act in disregard of those powers, they render themselves liable to the Bank for any loss it may sustain by the unauthorised acts. That section does not enable third parties with whom contracts have been entered into to deny their liability to the Bank, if the Bank chooses to act upon the contract of its Directors. In a very elaborate judgment Mr. Justice Russell in *Turner* v. *Bank of Bombay* (1) points out that the action of the Director under such circumstances will not be *malum prohibitum*. On appeal Sir Lawrence Jenkins, C. J., and Tyabji, J., accepted this view. We are of the same opinion. Mr. Aiya Ayyar referred to section 7 and 24 of the Act and contended that the Directors are identical with the Bank and that if there is a prohibition against the Directors it is also a prohibition against the Bank. We are unable to agree with this contention. As pointed out in Buckley on Companies (9th Edition) page 626, "the Directors of a Company fill a double character. There are (*i*) agents of the Company, and (*ii*) trustees for the share-holders of the powers committed to them." It is this dual capacity that is recognized throughout the Indian Act. If an agent exceeds the authority conferred upon him by the principal, it is open to the principal to adopt it as if the agent acted within the scope of his authority. The party with whom the contract has been entered into is not entitled to repudiate the transaction. Of course if the unauthorised dealing is opposed to public policy, there can be no ratification. In *Great Eastern Railway Company* v. *Turner* (2), Lord Selborne defines the position of Directors thus: "The Directors are the mere trustees or agents of the Company—trustees of the Company's money and property, agents in the transactions which they enter into on behalf of the Company," and then he says: "I entirely assent to what was said by Sir Richard Baggallay, that there is no difference between an unauthorized investment of the money of a public Company by its trustees, and an unauthorized investment of the moneys belonging to any other trust by the trustees of that trust. It would be monstrous—it would be extravagant to the very last degree—to say, that because the money of *cestui que trust* has been laid out in an unauthorized manner, that, therefore, they are not to have the benefit of whatever value there is in the property bought with their

(1) 25 B. 52; 2 Bom. L. R. 803.
(2) (1873) 8 Ch. App. Cas. 149; 42 L. J. Ch. 83; 27 L. T. 697; 21 W. R. 163.

money." The reason of the rule is that, whatever may be the extent of liability *inter se* between the Directors and the Bank or the trustee and *cestui que trust*, it does not affect transactions with outsiders so as to enable the latter to claim exemption from the performance of their obligations. The view enunciated in *Turner* v. *Bank of Bombay* (1) has been applied in Madras to cases arising under the Indian Trusts Act. In *Kadir Ibrahim Rowther* v. *Arunachelam Chettiar* (3), the learned Judges held that where a trustee exceeded his powers in granting a lease, the transaction was only voidable at the option of the *cestui que trust* and was not void altogether. In *Sinaya Pillai* v. *Munisamy Ayyan* (4), where a guardian exceeded the powers given to him by the Guardians and Wards Act, the learned Judges held that his act was only voidable at the option of the ward. We must, therefore, hold that the action of the Directors in taking the security to cover future advances, although it may be in excess of the powers, was not void *ab initio* and that it was open to the Bank to have accepted the contract as concluded by the Directors. Mr. Aiya Aiyar relied very strongly upon the decision in *National Bank of Australasia* v. *Cherry* (5); one essential difference between that decision and the case before us is that in the former the prohibition which was contravened was against the Bank itself and not against the Directors. Lord Cairns, in delivering the judgment of the Judicial Committee, came to the conclusion that as the Bank was prohibited from entering into transactions of a certain class, any contravention of such an express prohibition vitiated the contract altogether. Courts have recognised that if a prohibition is in the interests of the share-holders and is based on considerations of public policy it must be regarded as *malum prohibitum*. *See* per Blackburn, J., at page 379 in *Taylor* v. *Chichester and Midhurst Railway Company* (6). In the present case, the contract does not affect the rights of the share-holders nor does it offend public policy. It is not the Bank that is prohibited from taking security (in regard to future advances or in the shape of immoveable property), but only the Directors. Therefore, the decision relied upon by Mr. Aiya Aiyar does not affect the present case. Moreover the Act of 1876, regulating banking transactions in this country was passed after the decision in *National Bank of Australasia* v. *Cherry* (5), and when the Legislature has advisedly not prohibited the Bank but only the Directors by section 37 from entering into transactions of a particular nature, it is reasonable to hold that the section only contains instructions to the Directors as to how they should manage the business of banking. It is well settled that, where there are provisions in an Act which are only directory and not mandatory, any disregard of those provisions will not make the transactoin void altogether. [*Queen* v. *Lofthouse* (7) and *Queen* v. *Ingall* (8).] In our opinion section 37 is only directory of the powers of the Directors. The parties with whom the contract has been entered into are not entitled to plead that they are absolved from liability, because the transaction is one which the Directors had no power to enter into. Curiously enough the Subordinate Judge quotes *Turner* v. *Bank of Bombay* (1), but entirely misunderstands the decision. We must, therefore, reverse his decision and direct him to take back the case on his file and dispose of it upon the other points arising in the case.

As the decree itself is reversed, it is not necessary to pass separate orders on the memorandum of objections. The costs in this Court of all parties will abide the result and should be provided for in the revised decree.

Appeal allowed; *Decree reversed*.

(3) 4 Ind. Cas. 1082; 33 M. 397; 19 M. L. J. 737.
(4) 22 M. 289; 9 M. L. J. 64.
(5) 3 P. C. 299.
(6) 2 Ex. Cases 356; 39 L. J. Ex. 217; 4 H. L. 628; 23 L. T. 657.
(7) 1 Q. B. 433; 7 B. & S. 447; 35 L. J. Q. B. 145; 12 Jur. (N. S.) 619; 14 L. T. 359; 14 W. R. 649.
(8) 2 Q. B. 199; 46 L. J. M. C. 113; 35 L. T. 552; 25 W. R. 57.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 1623 OF 1914.

February 15, 1915.

Present:—Mr. Justice Scott-Smith.

Musammat DAULAT—PLAINTIFF—APPELLANT

versus

KHAN—DEFENDANT—RESPONDENT.

Burden of proof—Marriage—Suit for declaration that

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar

MANIYAM KUPPANNA *v.* KUPPANA GOUNDEN.

plaintiff was not wife of defendant—Presumption —Divorced woman continues unmarried until proved to have married again.

The defendant having stated in a criminal case that the plaintiff was his wife, the plaintiff sued for a declaration that she was not the wife of the defendant:

Held, that it was for the defendant to prove that the plaintiff was married to him.

Held, also, that in the absence of an objection on the part of the defendant that the onus was wrongly placed on him by the original Court, the Appellate Court ought not to have shifted it on to the plaintiff.

In the case of a divorced woman the presumption is that she continues unmarried until proved to have married again.

Miscellaneous appeal from on order of the Divisional Judge, Multan, dated the 14th May 1914, reversing that of the Munsif, first Class, Multan, dated the 8th April 1914 (decreeing plaintiff's claim), and remanding the case for fresh decision.

Lala *Chandar Bhan*, for the Appellant.

Mirza *Mahbub Beg*, for the Respondent.

JUDGMENT.—In the suit out of which the present appeal arises *Musammat* Daulat, plaintiff, asked for a declaration that she is not the married wife of Khan, the defendant. The plaint showed that she wished for this declaration because in a complaint instituted by Khan under section 498, Indian Penal Code, on the 15th of October 1913, against Ghulam Hussain and *Musammat* Karam, the defendant alleged that she was his wife. The first Court laid the onus of proving that the plaintiff was the lawfully married wife of the defendant upon the latter and finding that he had not discharged it, decreed the claim. On appeal the Divisional Judge was of opinion that the onus was upon the plaintiff to prove that she was not the wife of the defendant. He, therefore, reversed the decree of the first Court and remanded the case for re-decision under Order XLI, rule 23, Civil Procedure Code.

From this order of remand the plaintiff has appealed to this Court. The *first* matter to note is that neither in the first Court, nor in the lower Appellate Court, did the defendant object to the onus having been laid upon him. It is, therefore, not understood why the lower Appellate Court shifted the onus and remanded the case. I am unable to agree with the learned Divisional Judge that the onus in this case was upon the plaintiff. The general rule as to the onus of proof and the consequent obligation of beginning is that the proof of any particular fact lies on the party who alleges it, not on him who denies it. The issue must be proved by the party who states an affirmative, not by a party who states a negative. See in this connection the Law of Evidence by Ameer Ali and Woodroffe, 5th Edition, page 629. If the plaintiff was married to the defendant, the fact is especially within his knowledge and he can easily prove it. The onus is, therefore, on him having regard to section 106 of the Indian Evidence Act, 1st paragraph. Again, the plaintiff was formerly the wife of another man who divorced her. The presumption is that she continued unmarried until proved to have married again. See page 712, note 12, of Ameer Ali and Woodroffe's Law of Evidence.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, remand the case thereto for decision of the appeal according to law. Stamp in this Court will be refunded and other costs will be costs in the case.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1644 AND 1645 OF 1913.

March 10, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

MANIYAM KUPPANNA GOUNDEN AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUPPANA GOUNDEN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Vendor and purchaser—Obligation to secure quiet and peaceful enjoyment—Signing of sale-deed, if sufficient—Contract of sale and delivery of possession—Defence against ejectment—Specific performance—Claim for mesne profits, essence of.

Per *Spencer*, *J.*—It is the duty of every seller o

immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey. [p. 196, col. 2.]

A contract of sale followed by delivery of possession cannot be pleaded in defence to an action for ejectment where there is no registered sale-deed, but the defendant can avoid the difficulty by suing for specific performance and getting the action in ejectment postponed pending the result of the suit. [p. 197, col. 1.]

Per *Coutts-Trotter*, J.—A vendor is under no obligation to register the document he had given. [p. 197, col. 1.]

The essence of a claim for mesne profits is that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. [p. 198, col. 2.]

Second appeals against the decrees of the Court of the Subordinate Judge of Trichinopoly, in Appeal Suits Nos. 312 and 279 of 1912, preferred against those of the Court of the District Munsif of Namakal, in Original Suits Nos. 598 and 342 of 1910, respectively.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellants.

Mr. *R. Shadagopachariar*, for the Respondents.

JUDGMENT.

SPENCER, J.—These two appeals arise out of the same transaction. Second Appeal No. 1644 of 1913 is a suit by a purchaser to compel the seller to execute a proper sale-deed for the land which he purchased in 1906 under a sale-deed which was not registered.

The Appellants' main contention is that the verbal agreement between the parties in October 1909 to execute a fresh sale-deed is not capable of being enforced, as it is devoid of consideration.

It has been found by the Subordinate Judge that over and above the Rs. 200 which formed the consideration for the original sale-deed of 1906, which remained unregistered owing to the sickness of the vendee, Rs. 25 were paid at some date subsequent to the execution of that sale-deed.

This sum will serve as sufficient consideration for the later agreement; but it is argued that the Subordinate Judge's conclusion that this was paid as an inducement to execute a fresh deed was not warranted by the evidence. It is true that plaintiffs' witnesses Nos. 1 and 2 do not in so many words state that the Rs. 25 formed the consideration for the agreement of 1909, but I think that this inference could fairly be drawn, as the Subordinate Judge has drawn it, from the fact that the stamp on Exhibit C, the paper on which the second sale-deed was to be written, was a three rupees stamp, whereas Exhibit A was drawn up on a two rupees stamp which was appropriate for the original consideration of Rs. 200. This fact also indicates that the payment of Rs. 25 described as gratuitous was not intended by the parties to give rise to no obligation, moral or legal, on either side. Moreover, it is the duty of every seller of immoveable property to secure his purchaser in quiet and peaceable enjoyment of the subject of the sale. This obligation cannot be considered as discharged by the mere signing of the sale-deed, but will continue until the purchaser has got an indefeasible title to the property which the seller purported to convey. Even in the absence of the payment of the additional sum of Rs. 25, I should be prepared to hold that there was consideration for the contract to execute a fresh sale-deed. In this view of the case, it becomes unnecessary to deal further with the questions whether the verbal agreement of 1904 was fully performed and whether its enforcement is now barred by limitation. The appellants' case has no merits, but is an unscrupulous attempt to take advantage of the respondent's failure, owing to the sickness and the death of the original purchaser, to get his sale deed registered within the time allowed by the Registration Act.

This second appeal must be dismissed with costs.

In Second Appeal No. 1645 of 1913 the seller seeks to treat the purchaser as trespasser, to eject him and to recover mesne profits from him during his occupation. He alleges that no consideration was paid for the sale of 1906 and relies on the fact that the sale-deed was not registered.

In *Kurri Veerareddi* v. *Kurri Bapireddi* (1)

(1) 1 M. L. T. 153; 29 M. 336; 16 M. L. J. 395 (F. B.).

the question was considered by a Full Bench whether a contract of sale followed by delivery of possession could, when there was no registered sale-deed, be pleaded in defence to an action for ejectment, and the question was answered in the negative. It was pointed out, however, by two of the learned Judges that the defendant could avoid the difficulty by suing for specific performance and getting the action in ejectment postponed pending the result of his suit. That is exactly what has been done in this case, and I have no difficulty, therefore, in deciding that the issne of this suit must follow the result of the suit for specific performance and that this second appeal must be dismissed with costs.

COUTTS-TROTTER, J.—In Second Appeal No. 1644 of 1913, I agree and I only desire to add a few words in deference to the very able argument advanced on behalf of the appellants by Mr. Krishnaswami Aiyar. He very frankly and, in my opinion, very wisely admitted that his clients' case on the facts as found was devoid of merits and rested wholly on contentions of law. That admission makes it only the more incumbent on us to see that full effect is given to his strict legal rights. In order to ascertain what they are, it is necessary to go carefully into the facts of the case. The facts of the case are as follows:—In 1904 there was an agreement by the 1st defendant to sell the lands in dispute to Periana Gounden, the plaintiffs' predecessor-in-title, for a sum of Rs. 200. Possession was given under that contract to the purchaser and the 1st defendant has been out of possession ever since. The purchase price was paid and a sale-deed was executed on the 2nd October 1906. That document was handed to the purchaser, but for reasons which are now immaterial, it was never registered according to to law. It was argued for the appellants that the transaction was then complete and that the 1st defendant had done all that was required of him and that Rs. 200, which was the consideration for that transaction, was exhausted by it and could not be further pleaded in aid to support any later transaction. With those contentions I agree. I do not think the vendor was under any obligation to register the document which he had given and if the matter stopped there, I think the plaintiff's suit would fail on the grounds that he had no legal title perfected by registration and that any suit to enforce that contract would be barred by limitation. But the matter did not stop there. It is clear that at some time or other between October 1906 and October 1909, the 1st defendant promised to execute a new sale-deed so as to make good the title of the purchaser. It is said that for that agreement there was no consideration and that in so far as the lower Court has purported to find that there was consideration, that finding is unsupported by any evidence.

Now the last date for registration of the original sale-deed (Exhibit A) was March 1907 and Perianna Gounden, the original purchaser died in October 1907. At some period before his death Perianna Gounden unquestionably paid the 1st defendant a further sum of Rs. 25. An expression is used which is said to indicate that that was a gift; but I do not think that that expression can be pressed to mean more than this: that it was a payment which he regarded as being one that he was under no moral obligation to make or do. I think on the known facts of the case there was no moral obligation on him to pay it. In October 1909 a stamp for Rs. 3 was purchased, it is not material by whom, out of moneys provided by the plaintiffs and that stamp would be the requisite stamp on a sale for consideration of Re. 225. Now on that the learned Judge in the lower Appellate Court came to the following conclusions which are to be found on page 17 of the printed pleadings paper. He says thus:—"If the paper, that is, the stamp, was purchased in accordance with the agreement of October 1909, there would appear to be no reason to doubt that the 1st defendant himself purchased it." That I think is an indication that he was prepared to find that the stamp was purchased in accordance with the new agreement. He goes on: "There is also evidence that as an inducement to 1st defendant to execute a fresh sale-deed he was even paid an extra sum of Rs. 25 over and above the price of Rs. 200 already paid. This extra sum of Rs. 25 was obviously intended as a consideration for the fresh agreement and it is probable, therefore, that as it did not form part of the original agreement it

was not considered necessary to mention it, either in the plaint or in the criminal proceedings. That a stamp paper of the value of Rs. 3 was purchased lends some support to this payment of Rs. 25 and probably the parties intended to bring about a sale-deed for Rs. 225." Now it is said that that finding is unsupported by the evidence. I, therefore, turn to what the evidence in regard to that matter is. We find it in the depositions of two on behalf of the plaintiffs, witness No. 1 and witness No. 8 for the plaintiffs. Plaintiffs' witness No. 1 says this: "As the time for registration was over, I asked 1st defendant to buy a fresh stamp paper for Rs. 3 and gave him Rs. 3 and he bought a stamp paper and gave it to us: he gave us this stamp. My brother's wife paid Rs. 3 to 1st defendant. We agreed to pay him Rs. 25 in excess as a present (that is the translation of the *Tamil* word '*enamaga*') and my brother paid him Rs. 25, it appears. As we refused to sell some other property to 1st defendant and sold it to a *parian* as previously agreed, he refused to execute a fresh sale-deed." And plaintiffs' witness No. 8 on page 34 of the printed documents paper says this: "Then 1st defendant agreed to execute a fresh sale-deed in respect of the plaint lands on our advising him to do so, and so Muthammal paid me Rs. 3 for a stamp-paper and I paid it to 1st defendant;" and then in cross-examination he says, "I was told by my sister that Rs. 25 was paid in addition to Rs. 200 and I said that three rupees stamp must be purchased." I agree with the contention of the learned Pleader for the appellants that this is clearly not evidence, and I do not think we need pay any attention to it in the absence of any means of knowing what question was put to elicit that answer. But it is not difficult from the other evidence to conclude that something of the sort must have happened.

Now reading that evidence, what is the proper inference to be drawn from it? I think the proper inference to be drawn is this: that sometime between March 1909—before that date there would be no object in paying a further sum of money to get the document registered in accordance with the original agreement—and his death in October 1909 the original purchaser, Perianna Koundan, paid Rs. 25 to the 1st defendant in order to induce him to execute a new document of title and that he agreed to do so; that that agreement remained in force and unexecuted until the purchase of the three rupees stamp was made in October 1909. I think that there was good consideration for that fresh agreement and that the 1st defendant first definitely broke it when he refused to make use of the stamp provided for the purpose and execute a fresh sale-deed in October 1909. I think that the plaintiffs' right to sue on this agreement accrued on that date and that, therefore, the suit which was filed on the 26th July 1910 is not barred by limitation. I, therefore, agree that the appeal fails and must be dismissed with costs.

IN SECOND APPEAL NO. 1645 OF 1913.

With regard to the appeal in the other suit, so far as the claim for possession of the property is concerned, in view of the decision in the earlier suit any relief of that kind at this date would obviously be useless and futile; and, therefore, this appeal resolves itself into a claim for mesne profits in respect of the claim for possession during the period when the purchaser had no legal title to the land. It may be conceded for the purposes of the argument that the appellants were entitled to possession and, therefore, by the Transfer of Property Act, would in the ordinary course be entitled to the rents and profits of the land. That seems to be the effect of the decision in *Kurri Veerareddi* v. *Kurri Bapireddi* (1) and though doubts have been cast upon that decision, it is not necessary to question its authority for the purpose of the present case. But a decree for possession would be, as I said, futile; and so the appellants only claim mesne profits. The essence of a claim for mesne profits is this: that it rests upon an agreement implied in law that when one person occupies property of another, he must be deemed to have tacitly assented to the condition that he is liable for an occupation rent in respect of that occupation. Now the facts here are quite inconsistent with any such implied obligation at all. The appellant knew perfectly well

the exact relation between himself and the person to whom he had agreed to sell the land. He knew that he was under a moral obligation not only to allow him to have possession, but to perfect his title to that possession by the execution of the necessary documents, and I think it is impossible to say that, such being the circumstances under which the possession was taken, there was an implied agreement between them that he should pay mesne profits in respect of an occupation to which, to the knowledge of both the parties, he was clearly morally entitled and only required the formal execution of a document.

I think that this appeal also fails and should be dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 652 OF 1913.

March 11, 1915.

Present:—Mr. Justice Shadi Lal and Mr. Justice Rossignol.

RADHU RAM—PLAINTIFF—APPELLANT

versus

Malak MOHAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 44, 91—Hindu Law—Joint family—Alienation of joint family property—Suit by minor member after attaining majority against vendee for possession of his share in immoveable property—Limitation.

The plaintiff's brothers during his minority sold the joint family land to the defendant including the share of the plaintiff. After expiry of three years from the date of plaintiff's attaining majority he sued for his share of the land. The suit was dismissed as barred by limitation under Article 44 of the Limitation Act. On second appeal it was contended for the respondents that the suit was rightly dismissed and that it was in any case barred under Article 91:

Held, that the suit was not barred, that neither Article 44 nor 91 was applicable to the case and that the plaintiff had 12 years to sue for possession of the land. [p. 201, col. 1.]

That the sale must be regarded as one made by the adult members of the family on behalf of the entire co-parcenary body including themselves and their youngest brother. The alienation could not be viewed as one made on behalf of the minor by his guardian to make Article 44 applicable, for minor's undivided share in joint family estate is not property which can be dealt with by his guardian. [p. 200, col. 1.]

Gharibullah v. *Khalak Singh*, 25 A. 407 at p. 413 (P.C.); 5 Bom. L. R. 478; 7 C. W. N. 681; 30 I. A. 165; *Bindaji* v. *Muthura Bai*, 30 B. 152; 7 Bom. L. R. 809, referred to;

That Article 91 is not intended to apply to suits for possession of immoveable property alienated by managers of joint families and endowments or by Hindu widows or other persons whose powers are restricted. In such cases if the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside. An express prayer in the plaint for the cancellation of such an instrument may be treated as not an essential part of the plaintiff's relief. [p. 200, col. 2.]

Unni v. *Kunchi Amma*, 14 M. 26; *Balwantrao* v. *Ramkrishna*, 3 Bom. L. R. 682; *Sheo Shankar* v. *Ram Shewak Chowdhri*, 24 C. 77 at p. 82 and *Din Dial* v. *Har Narain*, 16 A. 73; A. W. N. (1894) 1, referred to.

Second appeal from the decree of the Additional Divisional Judge, Shahpur Division at Lyallpur, dated the 3rd January 1913, reversing that of the District Judge, Jhang, dated the 24th August 1911, decreeing plaintiff's claim.

Mehta *Bahadur Chand*, for the Appellant.

Bhagat *Govind Das*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellant, Radhu Ram, for posession of his share in the land sold during his minority by his brothers, Das Ram and Sadhu Ram, by a registered sale-deed, dated the 20th August 1900. The Court of first instance decreed the suit in favour of the plaintiff, but the learned Divisional Judge on appeal held that Article 44 of the Limitation Act was applicable and that as the action was brought after the expiry of three years from the date of the plaintiff's attaining majority, it was barred by time under that Article. The plaintiff has preferred a second appeal to this Court, and after hearing the learned Pleaders on both sides, we have come to the conclusion that the finding on the point of limitation cannot be upheld and that this appeal must be accepted and the case remanded to the lower Appellate Court for decision on the merits.

The learned Divisional Judge has accepted the contention of the respondents that the three brothers constituted a joint Hindu family at the time of the alienation and we are of opinion that that finding is correct. The pre-

sumption is certainly in favour of the jointness and the evidence on the record is wholly insufficient to rebut that presumption. The sale must, therefore, be regarded as one made by the adult members of the family on behalf of the entire co-parcenary, body including themselves and their youngest brother, who was then a minor. We are, however, unable to concur in the view that, so far as the minor is concerned, the alienation should be viewed as one made on his behalf by his guardian, and that the present suit is to be considered as one brought by a *quondum* minor to set aside a sale by his guardian within the purview of Article 44. The law is fairly established that the minor's undivided share in the joint family estate is not property which can be dealt with by his guardian. As observed by their Lordships of the Privy Council in *Gharibullah* v. *Khalak Singh* (1): "It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided *Mitakshara* family. And in their Lordships' opinion those decisions are clearly right, on the plain ground that the interest of a member of such a family is not individual property at all, and that, therefore, a guardian, if appointed, would have nothing to do with the family property. And applying these observations to the present case their Lordships think that the mortgages under consideration were not mortgages by the guardian, assuming the mother to have been a guardian, but mortgages by the family, entered into by the *karta* of the family with the concurrence of Jangli, the only other adult member of the family, if indeed he was an adult." See to the same effect *Bindaji* v. *Mathura Bai* (2). In view of these observations we think that Article 44 is wholly inapplicable and that the decision of the lower Appellate Court cannot be maintained.

The learned Pleader for the respondents has asked us to apply Article 91 to the case, but we think that that Article cannot be invoked for the purpose of establishing the bar of limitation against the plaintiff. An instrument of alienation, executed by a person who, not being the *full* owner of the property, has a *conditional authority* only to dispose of it, need not be set aside if the condition under which the authority might be exercised had not been fulfilled. Such are the cases of a sonless Hindu widow, the *karta* or manager of a joint family and the *karnavan* of a Malabar *tarwad*. In these cases it is not only not necessary, but it is not possible, to have the instrument of alienation cancelled and delivered up, because, as between the *parties* to it, it may be a perfectly valid instrument. All that is needed is a *declaration* that the plaintiff's interest is not affected by the instrument, and that declaration is merely *ancillary* to the relief which may be granted by delivery of possession. The plaintiff may treat the instrument as non-existent, and sue for his right as if it did not exist. Even an express prayer in the plaint for the cancellation of such an instrument may be treated as not an essential part of the plaintiff's relief. See *Unni* v. *Kunchi Amma* (3)]. In *Balwantrao* v. *Ramkrishna* (4), the Bombay High Court approved of this Madras ruling, and applied it to the case of a deed of sale of joint family property executed by a *Mitakshara* father without the assent of his son. As the sale was not proved to have been made for any purpose sanctioned by Hindu Law, the deed was not binding on the son, and Article 91 was held to be inapplicable to the son's suit to recover his share of the property sold. Article 91 has never been applied to an alienation by the manager of an endowment, the manager of an infant heir, a Hindu widow or any other of the persons whose powers are placed on the same footing by *Hanuman Prasad Pandey's* case. If the person who executes the document had no authority in law to execute it, the plaintiff need not sue to set it aside but may treat it as of no effect [*Sheo Shankar* v. *Ram Shewak Chowdhri* (5)]. See to the same effect *Din Dial* v. *Har Narain* (6). Mr. Govind Das has not been able to cite a single judgment in which Article 91 has been applied to the suit of a member of *Mitak-*

(1) 25 A. 407 at p. 416 (P. C.); 5 Bom. L. R. 478; 7 C. W. N. 681: 30 I. A. 165.
(2) 30 B. 152; 7 Bom. L. R. 809.
(3) 14 M. 26.
(4) 3 Bom. L. R. 682.
(5) 24 C. 77 at p. 82.
(6) 16 A. 73; A. W. N. (1894) 1.

shara family for possession of his share of the property alienated by the manager thereof and on the authorities cited above, we are of opinion that the period of limitation for a suit of this kind is twelve years.

We must, therefore, hold that neither Article 44 nor Articale 91 operates as a bar to the suit and that as it has been brought within twelve years from the date of the alienation, it is clearly within time. The lower Appellate Court has not given definite findings on the merits of the case and we must, therefore, accept the appeal, set aside the judgment and the decree of the lower Appellale Court and remand the case for decision on the remaining points in controversy between the parties. The Court, fee on the memorandum of appeal shall be refunded and other costs shall be costs in the cause.

Appeal accepted; Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 917 OF 1914.

March 17, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Coutts-Trotter.

VELAPPA GOUNDEN—PLAINTIFF—APPELLANT

versus

PALANI GOUNDEN AND ANOTHER—DEFENDANTS NOS. 1 AND 2—RESPONDENTS.

Document, construction of—Principle—Plain and unambiguous words—Court, duty of—Evidence Act (I of 1872), s. 94—Deed—Language plain and definite—Evidence, admissibiliiy of, to prove language applies to other facts.

Per *Spencer, J.*—When the language used is plain and applies accurately to existing facts, evidence is not admissible for the purpose of showing that it was not meant to apply to those facts. [p. 201, col. 2.]

Per *Coutts-Trotter, J.*—Where the words used in a document are definite and unambiguous, the Court must not travel outside the words used to found or confirm speculations as to the parties to the document having in fact intended other than what they have said. [p. 202, col. 2.]

Shore v. *Wilson*, 9 Cl. & F. 355; 11 Sim. 592; 7 Jur. 781; 8 E. R. 450; 57 R. R. 2, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Coimbatore, in Appeal Suit No. 9 of 1913, preferred against that of the Additional District Munsif of Tirupur, in Original Suit No. 677 of 1911.

Mr. *T. Rangachariar*, for the Appellant.

Messrs. *S. Swaminadhan* and *S. Ranganadha Aiyar*, for the Respondents.

JUDGMENT.

SPENCER, J.—Five survey fields, Nos. 367, 368, 369, 371 and 421, measured acres 10, cents 11 according to the old survey. The 1st defendant sold on 18th November 1909 a moiety, *viz*, acres 5, cents $5\frac{1}{2}$ to the 2nd defendant.

To make up this extent he included the whole of survey Nos. 368, 369 and 371, which amounted to acres 4 and cents 46, and added thereto $59\frac{1}{2}$ cents out of survey No. 367, the total area of which was acres 4, cents 18.

Of the five above-mentioned fields which descended to the 1st defendant and another from a common ancestor, no portion of survey No. 421 was included in the 1st defendant's sale-deed to the 2nd defendant.

It was subsequently ascertained at the re-survey that the extent of land in survey No. 367 in the 1st defendant's possession was acre 1, cents 29. Deducting the $59\frac{1}{2}$ cents which he had sold to the 2nd defendant there remained thus $69\frac{1}{2}$ cents. He sold those $69\frac{1}{2}$ cents to the plaintiff on the 29th December 1910 and the plaintiff brought this suit to recover this portion.

He succeeded in the first Court, but failed in the Appellate Court when the second defendant appealed.

The Subordinate Judge misdirected himself when in his judgment he set out to consider whether the parties intended that the whole extent which came into the 2nd defendant's possession should be conveyed by the earlier sale-deed. The District Munsif stated the point for consideration correctly when he observed that the main point for determination was the extent of land actually sold to the 2nd defendant by the 1st defendant according to Exhibit I. When the language used is plain and applies accurately to existing facts, evidence is not admissible for the purpose of showing that it was not meant to apply to those facts (section 94 of the Evidence Act). Now Exhibit I declares that the extent sold to the 2nd defendant

out of survey field No. 367 is 59½ cents and nothing more ("only these items of land I have sold" together with easement rights of irrigation.)

It further mentions that this extent was in the 1st defendant's enjoyment ("those in my enjoyment are" and then the details follow) and that it was on the northern side of the field.

Boundaries are not given. In the absence of boundaries, should the description of the plot afforded by its exact extent and the assessment payable on that extent prevail? Or, are we to ignore all that and draw the inference that because the vendor declares that the plots which he is selling are in his possession, there was really a sale of all the extent which he happened to possess at that date within the limits of the field?

To adopt the latter course would be, in my opinion, to disregard the meaning of plain language and to has our decision upon mere surmise, preferring vagueness of description to certainty. If *A* says to *B*, "I sell you one acre out of Whiteacre and the portion of Blackacre which is in my possession", it becomes necessary to inquire how much of Blackacre was in *A*'s possession at the date of sale, but it does not signify whether *A* possesses one acre or two acres of Whiteacre, as mention is made of a definite area. Of two kinds of descriptions, preference must be given to the more definite.

I consider that the appeal should be allowed and that reversing the lower Appellate Court's judgment, the decree of the District Munsif should be restored with costs throughout, with the modification that the 2nd defendant shall be allowed to select his 59½ cents out of the whole acre 1, cents 29 and the balance should be placed in the plaintiff's possession.

COUTTS-TROTTER, J.—This was an action brought by the plaintiff to establish his title to certain land sold to him by a deed of 29th December 1910 by Ramasami Gounden, the first defendant. The deed purported to convey to him 69½ cents of land, forming a portion of Government Survey No. 367 in the village of Savandappur; it was duly executed and registered, and no question arises under it. When he sought to take possession, however, the plaintiff found himself confronted by a claim to the land put forward by the 2nd defendant, Palani Gounden, who based his title upon a previous sale-deed executed in his favour on the 18th November 1909 also by the 1st defendant, which was alleged to have conveyed the self-same piece of land to the 2nd defendant. The plaintiff thereupon brought his action against both the defendants to try the issue of title as between himself and the second defendant, and the sole issue both in the action and the appeals is as to whether the sale-deed of 18th November 1909, on its true construction, did in fact convey this parcel of land to the second defendant. The trial Judge decided that it did not; the Subordinate Judge took the opposite view, and this Court has to decide, on the plaintiff's appeal, which construction was the right one.

The rule of construction which the Court must obey in determining this question is well understood and long established and is best expressed in the well-known opinion of Tindal, C. J., in *Shore* v. *Wilson* (1). Though the object of the Court must always ultimately be to ascertain the intention of the parties, yet the intention must be gathered from the words they have used where those words are definite and unambiguous; and the Court must not travel outside the words used to found or confirm speculations as to their having in fact intended something other than what they have said.

Turning to the words of the present document, it is obvious that what was conveyed was a portion of Survey No. 367 and the only question is, what portion. The operative words begin with an enumeration of some property belonging to the first defendant and another person jointly, and among it is field No. 367 with an acreage of 4·88 acres. The document then goes on, "out of these, those in my enjoyment are" certain other properties, and "the northern side in field No. 367 acre 0—59½.....only these items of land have I sold". I do not feel on very sure ground in attempting to construe words

(1) 9 Cl. & F. 355; 11 Sim, 592; 7 Jur, 781; 8 E. R. 450; 57 R. R. 2.

which are a translation of the original language, but I do not feel it possible to hold that there is any clear definition of the portion of Survey No. 367 other than that it consists of 59½ cents. As my learned brother is acquainted with the original *Tamil* and has come to the same conclusion, I am encouraged to think that my judgment is not vitiated by ignorance of the language used by the parties. And it is a comfort to reflect that this construction, while leaving the 2nd defendant with the same acreage that he paid for, prevents a gross injustice to the plaintiff.

I agree that the appeal should be allowed with costs.

Appeal allowed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 234 OF 1914.

March 9, 1914.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

GODAVARTHI PERIA *alias* ETHIRAJAYYA—PETITIONER—APPELLANT

versus

GODAVARTHI LAKSHMIDEVAMMA AND OTHERS—RESPONDENTS.

Costs to abide—Costs to abide and follow the result, meaning of.

The words "to abide and follow the result" convey the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await till decision is given in the case. They do not have the effect of fettering the discretion of the trying Court.

Appeal, under clause 15 of the Letters Patent, against the judgment of the Hon'ble Mr. Justice Tyabji, in Civil Revision Petition No. 348 of 1913, preferred against that of the District Court of Guntur, in Original Petition No. 196 of 1910.

Mr. *T. Ramachandra Row*, for the Appellant.

Mr. *N. S. Narasimhachari*, for the Respondents.

JUDGMENT.—In remanding the civil miscellaneous appeal, the High Court ordered "that the costs shall abide the result". On the re-hearing the Court below in the exercise of its discretion refused to give costs to the appellant. It is contended that the language of the order of the High Court makes it incumbent upon the Court below to award costs to the person who succeeds, and that the District Judge has no jurisdiction to pass any other order: We are not prepared to agree with this contention. If the words used were "to abide and follow the result", they may be interpreted as conveying the suggestion that the successful party must be given his costs. But the words "abide the result" only connote that the order as to costs is to await till decision is given in the case. They have not the effect of fettering the discretion of the trying Court. In *Templeton* v. *Laurie* (1) the language was "to follow the event." The learned Judge held that the Court below had no discretion in the matter. The expression used in the Bombay judgment have the same import as the words "to abide and follow the result."

The words '*abide the result*', broadly speaking, are equivalent to the words "costs in the cause." We are of opinion that the Court below had a discretion to apportion costs. The observations of Lord Esher in *Brotherton* v. *Metropolitan District Joint Committee* (2) support this view. The decision in *Fani Bhushan Roy Chowdury* v. *Rama Sundari Debi* (3) is not inconsistent with this conclusion as pointed out by Mr. Justice Tyabji, The learned Judge is right in the view he has taken.

This Letters Patent appeal is dismissed with costs.

Appeal dismissed.

(1) 25 B. 230 at p. 237; 2 Bom. L. R. 244.
(2) (1894) 1 Q. B. 666; 9 R. 154; 70 L. T. 218; 42 W. R. 273.
(3) 4 C. W. N. 343.

OFFICIAL ASSIGNEE *v.* BANGY ABDUL RAZACK SAHIB.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 92 OF 1913.

February 23, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

THE OFFICIAL ASSIGNEE OF MADRAS —APPELLANT

versus

BANGY ABDUL RAZACK SAHIB AND OTHERS—RESPONDENTS.

Presidency Towns Insolvency Act (III of 1908), *s.* 56 *—Vendee in good faith, when not—Sale, validity of—Official Assignee.*

Where a sale was made for a price appreciably lower than the real value of the property and the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor and where he conspired with the vendor to assist the vendor to defraud or delay other creditors:

Held, that the vendee was not a vendee in good faith within the meaning of section 56 of the Presidency Towns Insolvency Act; [p. 204, col. 2.]

that the sale was void as against the Official Assignee. [p. 205, col. 1.]

Appeal from an order of the Hon'ble Mr. Justice Bakewell, dated the 25th September 1913 in the Insolvency Jurisdiction of this Court, in Insolvency Petition No. 110 of 1913 in the matter of A. S. Mahammad Oosman Sahib and Co., Insolvents.

FACTS.—The Official Assignee presented a petition on behalf of the general body of creditors of an insolvent, named A. S. Mahammad Oosman, a merchant in George own, to the original side of the High Court before Mr. Justice Bakewell sitting as Commissioner in Insolvency. The insolvent filed his schedule on 18th May 1910, but prior thereto he had conveyed all his available immoveable property in favour of his father-in-law, the alleged consideration being Rs. 5,800, a major portion of which was in respect of an old debt due to the vendee and Rs. 1,500 paid in cash before the Sub-Registrar at the time of the registration of the sale-deed. Mr. Justice Bakewell held that, the vendee "having acted in good faith," the sale could not be impeached.

Against that order the Official Assignee preferred this appeal.

Mr. *M. K. Ramasawami Aiyar*, for the Appellant.

Messrs. *M. A. Tirunarayana Chariar* and *Short & Bewes & Co.*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The only question in this appeal is whether the sale-deed for Rs. 7,000 executed by the insolvent to his father-in-law, who is now represented by the respondents, can be upheld as against the Official Assignee. In other words, the question is whether Abdul Kadir, the vendee, was a "purchaser in good faith and for valuable consideration" within the meaning of section 55 of the Insolvency Act. If the sale was made for an adequate price and if further the vendor's debt, which was discharged out of the purchase-money, was equal to or nearly equal to the value of the property, I am not disposed to treat the transaction as fraudulent, or to hold that the vendee is not a vendee in good faith. If, however, the sale was for a price appreciably lower than the real value of the property and if there are facts indicating that the vendee was actuated by the intention to get a much larger benefit for himself than he was fairly entitled to as a diligent creditor or that he conspired with the vendor to assist the vendor to defraud or delay other creditors, then the vendee cannot be treated as a vendee in good faith.

The Rs. 7,000 purchase money is made up of Rs. 5,817 and odd due by the insolvent to the vendee on prior dealings and a sum of Rs. 1,150 alleged to have been paid in cash to the insolvent. Though this sum of Rs. 1,150 was paid before the Registering Officer, I think that it was a sham payment as the insolvent's books do not contain any entry about the payment of this Rs 1,150 and the entries in the account books of the vendee contain suspicious recitals as to the source from which the Rs. 1,150 was obtained for payment before the Sub Registrar. Having also in view the relationship of the parties, I am unable to agree with the learned trial Judge that the sum of Rs.1,150 was really paid to thei nsolvent. If, however, the value of the property was only Rs. 7,000, which is the price mentioned in the sale-deed, it may be that, notwithstanding the failure to pay Rs. 1,150, the transaction might be upheld as there *was consideration for the sale* to the extent of nearly Rs. 6,000. But on the evidence of the plaintiff's 6th witness

which I see no reason to disbelieve, I am satisfied that the value of the properties sold, excluding the six shops, was about Rs. 13,000 and adding the value of the shops, the total value of the properties sold was about Rs. 14,000, just double the price mentioned in the sale-ded. I am unable to agree with the learned Judge that Rs. 7,000 was fair price, because the sale was in the nature of a forced sale. There is nothing to show that the insolvent could not have sold the properties for more than Rs. 7,000 or that there was such pressure placed by his father-in-law on him that he was obliged to part with these properties at such a great loss to himself.

The conduct of the insolvent, from a few days before the date of this sale till he was adjudicated an insolvent in May 1910, also clearly indicates his intention to keep his properties out of the clutches of his other creditors and to defraud his other creditors.

Of course, it might be said that though the insolvent might have had a fraudulent intention, the vendee is not a stranger to the insolvent and the probabilities are that the vendee and the vendor were acting together in collusion to defraud the other creditors.

Following the principles laid down in the case *Chidambaram Chettiar* v. *Sami Aiyar* (1), I would hold that the sale was wholly void as against the Official Assignee and I would set aside the judgment of the learned Judge and declare accordingly in favour of the Official Assignee, who is entitled to get his costs in both Courts from the respondents. This order is of course without prejudice to the respondents proving their claim as unsecured creditors in respect of the moneys due to Abdul Kadir by the insolvents.

Costs to be on the original side scale certified for two Counsel.

NAPIER, J.—I concur.

Appeal allowed.

(1) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 2 OF 1915.

April 19, 1915.

Present:—Justice Sir P. C. Banerji, KT.

SHEO PRASAD AND ANOTHER—DEFENDANTS —APPELLANTS

versus

LALA RAM—PLAINTIFF—RESPONDENT.

Contribution, suit for—Court, duty of, to determine liability of each defendant—Joint decree erroneous.

In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous. [p. 206, col. 1.]

In such a suit what the Court ought to determine is whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned, he is entitled to recover what is due to him from all the debtors, but as between the debtors, each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff has paid for him. [p. 206, col. 1.]

Petition for revision against an order of the Officiating Small Cause Court Judge of Allahabad, dated the 17th June 1914.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *K. N. Laghate*, for the Respondent.

JUDGMENT.—This application for revision arises out of a suit for contribution brought in the Court of Small Causes at Allahabad so far back as the year 1911. The case came up to this Court once before and after certain issues had been sent down to the Court below, it was finally remanded to that Court for re-trial in accordance with the judgment of Mr. Justice Tudball reported as *Lala Ram* v. *Sheo Prasad* (1). The facts are these:—

The plaintiff and the two defendants jointly took a lease from the Oudh and Rohilkhand Railway Company for cutting grass. The rent reserved by the lease was Rs. 2,000. The Railway received on account of rent the total sum of Rs. 1,533-5-6; for the balance, namely Rs. 466-10-6, a suit was instituted on behalf of the Secretary of State against the three defendants and a decree was obtained on the 28th of May 1909. The amount of the decree was realised from the plaintiff alone and thereupon he brought the suit, out of which this application for revision arises, for contribution against the two defendants. The

(1) 20 Ind. Cas. 176; 11 A. L. J. 657.

suit was first dismissed, on the ground that it could not be maintained until after an account of the partnership had been taken. The defendants contended that they had paid off their share of liability for the rent and that nothing was due by them. After the remand by this Court the case was tried by the learned Judge of the Court of Small Causes and he made a decree for the full amount of the claim against the two defendants.

This decree is clearly wrong in one respect. It was made jointly against both the defendants. In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous.

There is another error in the decision of the Court below, and it is this.

The learned Judge thinks that because a decree was passed against the plaintiff and defendants, therefore the defendants are liable for 2/3rd of the decretal amount. This view also is clearly erroneous.

In a suit for contribution what the Court ought to determine is, whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned he is entitled to recover what is due to him from all the three debtors, but as between themselves each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff has paid for him. If the learned Judge had proceeded to try the case from this point of view, he would not have made a decree in the manner in which he made it. After the remand no evidence was given to show how the partnership account stood and, therefore, the case had to be tried independently of the partnership account, there being no materials before the Court to enable it to judge what would be the liability of each partner if a complete account of the partnership were taken.

As I have said above, the total amount of rent payable by the parties was Rs. 2,000; each of them was, therefore, liable out of that amount for Rs. 666-10-8. We have to see how much was paid by each of them out of this amount. From the evidence of Mr. Bowder, the Engineer of the the Railway, it appears that two sums of Rs. 500 each were paid up to the 19th of October 1907. There is no clear evidence as to who made these payments, that is to say, who found the funds with which this sum of Rs. 1,000 was paid. The plaintiff says in his deposition that he paid the first item of Rs. 500 out of funds in hand, by which he apparently meant the partnership funds, that is to say, the proceeds of the sale of grass. If that statement is true, then all the partners contributed that sum. As for the 2nd item there is an absence of evidence as to who contributed that sum. Mr. Bowder makes a somewhat vague statement on the point, as he says that one or other of the defendants must have paid the last six items mentioned by him. In the absence of clear evidence it must be presumed that the second sum of Rs. 500 was also paid by all the three persons; so that out of this sum of Rs. 1,000 each of the two defendants, Shiv Prasad and Shiv Tahal, must be deemed to have paid one-third, *i. e.*, Rs. 333-5-4. Mr. Bowder's evidence shows that Shiv Prasad paid Rs. 300 more on three different dates and that Shiv Tahal paid Rs. 233-5-6. In the absence of any evidence to show that this money was paid by them out of the proceeds of the partnership business, they must be presumed to have paid the two sums mentioned above. Therefore, the total amount contributed by Shiv Prasad must be held to have been Rs. 633-5-4 and that contributed by Shiv Tahal Rs. 566-10-10. Shiv Prasad and Shiv Tahal were, as I have said above, liable for Rs. 666-10-8 each. Therefore, the amount contributed by Sheo Prasad was short by Rs. 33-5-4 and that contributed by Shiv Tahal was short by Rs. 99-15-10. These are the amounts for which these two persons must be held liable to the plaintiff. The result is that I discharge the decree of the Court below and make a decree in the plaintiff's favour for Rs. 33-5-4 against Shiv Prasad and Rs. 99-15-10 against Shiv Tahal.

Having regard to all the circumstances of the case, I direct that the parties bear their own costs of the whole litigation including the costs in this Court.

Appeal allowed; Decree modified.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 167 OF 1914.

March 5, 1915.

Present: - Mr. Justice Piggott.

THE ROHILKHAND AND KUMAUN RAILWAY CO.—DEFENDANT—APPELLANT

versus

ISMAIL KHAN—PLAINTIFF—RESPONDENT.

Railway—Goods consigned—Indemnity bond—Risk note form A—Goods, shortage of—Liability of Railway Company—Right of consignee.

Where the sender of goods through a Railway Company signs "risk note form A", he indemnifies the Company and makes it free from all responsibility for the condition into which the goods may be delivered to the consignee at destination and for any loss arising from the same. The consignee, however, is entitled to have the consignment weighed on the spot in the presence of some respectable servant of the Railway Company and it is the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this operation. If the Railway servants do not allow the consignee to have the goods weighed at the time of delivery and thus let them remain lying in the Railway go-down to the detriment of the consignee, the Company is liable in damages. [p. 208, cols. 1 & 2.]

A risk note in form A is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee who is entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. [p. 209, col. 2.]

Petition for revision against an order of the Small Cause Court Judge, Bareilly, dated the 21st July 1914.

FACTS.—A consignment of 11 tins of *ghi* was made over to the applicant Company at Tanakpur Railway Station for delivery to Ismail Khan at Bareilly. The sender was required to sign a risk note, as the goods were defectively packed and were liable to leakage and wastage. By this risk note, the sender covenants that he will hold the Railway Company free from all responsibility for the condition in which the goods may be delivered to the consignee. When the goods reached Bareilly, the consignee thought that five tins had suffered damage and he refused to take delivery except on certain conditions. After some time the Company sold the goods at auction. The plaintiff brought the present suit for damages, and it was decreed by the first Court. The defendant Company applied in revision to the High Court.

Mr. *B. E. O'Conor*, for the Appellant:—The applicant Company was not liable for any loss arising from leakage or wastage in transit. The consignor was required to sign the risk note with this object and the risk note having been signed, all responsibility of the Company ceased.

The Judge has decreed the suit on the ground also that the Company acted unreasonably in refusing delivery to plaintiff on his terms. The Company was not in any way bound to endorse the shortage on the Railway receipt. The plaintiff wanted an admission by the Company's servants of the shortage and wanted to supply evidence for his case from the Company, and this the Company could refuse to do. The consignee could not demand delivery subject to the condition that the shortage should be noted down by the Company on the receipt or in its books.

I rely on *Jwala Pershad* v. *Great Indian Peninsular Railway* (1).

Even if the endorsement had been made, the consignee could not sue the Railway Company for loss in view of the risk note and so no injury accrued to plaintiff by the conduct of the Company. The Company was always willing to help the plaintiff and up to the last moment before auction, it gave him notice to remove the goods under sections 55 and 56 of the Railways Act.

Dr. *S. M. Suleman*, for the Opposite Party:—The plaintiff did not sign the risk note. Plaintiff wrote several times to the Company. He wanted that the goods should be weighed at the Railway Station but the Company did not heed him. The Station, Master wanted receipt for the full amount of *ghee* and refused to weigh. This fact was represented to the Company. Still no action was taken.

The plaintiff never wanted the Railway Officials to endorse the shortage. He was willing to note it himself.

The execution of the risk note did not entitle the Company to demand receipt for the full quantity which was not delivered.

Even if the plaintiff could not have been able to sue the Company, he could sue the consignor and hence his attitude in wanting to note the shortage was reasonable.

Mr. *B. E. O'Conor*, in reply:—The Railway receipt was in possession of the plaintiff.

(1) 21 Ind. Cas. 448; 11 A. L. J. 772.

He could have endorsed the shortage on the receipt and given it to the Station Master. No one could prevent him from doing so. His attempt was to get an endorsement from the Station Master and to collect evidence in his favour.

JUDGMENT.—This is an application in revision on the part of the Rohilkhand and Kumaun Railway Company, against whom the opposite party, who was the plaintiff in the Court below, has obtained a decree for a sum of Rs. 311 from the Court of Small Causes at Bareilly. The case has been brought before this Court, because the defendant Company desires to obtain an authoritative decision as to the respective rights and liabilities of the parties in respect of goods consigned under what is known as a "risk note, form A." The essential facts are simple. The plaintiff was the consignee of eleven tins containing *ghi* which were made over to the defendant Company at Tanakpur Railway Station for delivery to the plaintiff at Bareilly. When the consignment was tendered, it appeared to the Railway Company that the goods were so defectively packed as to be liable to damage, leakage or wastage in transit. Accordingly the sender was required to sign the risk note above referred to. This document is in effect an indemnity bond, whereby the sender covenants that he will hold the Railway Company harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination, and for any loss arising from the same. When the consignment reached Bareilly, the consignee was of opinion that the five out of the eleven tins had suffered damage in transit. He refused to take delivery except on certain conditions. A lengthy correspondence followed, and finally the defendant Company sold the *ghi* at auction. The *ghi* had clearly deteriorated in value and the price realised was a small one. The Court below has held that the plaintiff was entitled to compensation, which has been assessed at the sum already stated. With regard to the position of the parties at the moment the consignee inspected the goods at Bareilly Station and the proper course for the consignee, to have followed under the circumstances it seems to me that the principles involved are fairly obvious and have been very correctly laid down by this Court in the case of *Jwala Pershad* v. *Great Indian Peninsular Railway* (1), and in another case which is printed as a foot-note* to the report above-mentioned. The consignee was entitled to have the goods weighed then and there before he surrendered the railway receipt. When this had been done, he was entitled to endorse on the back of the railway receipt a statement that he accepted delivery of the consignment as it stood, while taking note of the fact that its actual weight was only so much and not the full weight as given in the railway receipt itself. He would probably also have been entitled to add to his endorsement any remarks which he might think proper to make for his own protection regarding the appearance of the consignment at the moment of his accepting delivery. The Station Master or other local officials of the Railway Company at the delivery Station were bound to offer to the consignee reasonable facilities for weighing the goods on the spot, and would, in my opinion, be going beyond their legal rights if they insisted on the surrender of the railway receipt, with a mere endorsement to the effect that the goods therein specified had been duly received, before allowing the consignee access to the goods for the purpose of verifying the weight. It being obvious, on the other hand, that the Railway Company were bound in self-protection, and would be perfectly entitled, to maintain effective custody of the goods through their servants and agents until the railway receipt was delivered up to them, the practical result is that the plaintiff's rights were to have this consigment weighed on the spot in the presence of some respectable servant of the Railway Company and that it was the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this operation. Now it is quite certain that the consignee in this particular case was not allowed to do what I have above suggested. The case for the defendant Company is that the only reason why he was not allowed to do so was that he did not content himself with asking merely for this, but he required the Station Master or some other official of the Company to certify by his signature, either on

*See *Koka Mal* v. *G. I. P. Railway*, 21 Ind. Cas. 428; 11 A. L. J. 775 *note*.—*Ed.*

S. N. DAR, B.A. LL.B.
Vakil High Court.
SRINAGAR (Kashmir)

the endorsement proposed to be made on the railway receipt, or on some other document, that the consignment in question was in fact being delivered short weight and perhaps also in a damaged condition. This is really a simple issue of fact, and the utmost that could be said in support of this application for revision would be that the position has not been fully appreciated in the Court below and the mind of that Court not directed with sufficient clearness to the investigation of the precise question of fact on which the rights or liabilities of the parties should have been made to depend. I think there is a certain amount of force in this argument; but I am not disposed to allow it to prevail. For one thing I am of opinion that, if there was any misapprehension of the essential issues of the case in the Court below, that was largely due to the attitude taken up by the defendant Company in their pleadings before that Court, a point as to which I have a few words to add presently. I am further of opinion that, from any possible point of view, the Company in this particular instance must be held to have made themselves liable to the payment of *some* damages at any rate to the plaintiff by reason of the delay which took place before the claim of the plaintiff consignee to take delivery, either of a portion only of the consignment or of the entire consignment subject to conditions, was either accepted or definitely rejected on behalf of the Company. It seems to me that those responsible for the action taken on behalf of the defendant Company in this matter were not only under some misapprehension as to the extent of their legal rights, but were at the same time using their advantageous position, as being the party in possession of goods of a peculiarly perishable nature, in order to put pressure on the consignee to accept delivery on their own terms. The Company was in no hurry, being under the impression that any loss which might result from the deterioration of the *ghi* lying in their godown would inevitably be borne by the consignee. There was always the possibility in their favour that the latter might become nervous as to the extent of this loss and the soundness of his legal position, and might close the transaction by accepting delivery on a railway receipt endorsed with a mere acceptance of the goods as despatched. From the arguments that have been addressed to me in support of this application, I think there is some misapprehension on the side of the Railway Company with regard to the legal effect of a risk note in "form A." That document is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee. The latter is obviously entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. The question whether, in this particular case, if delivery had been made on the railway receipt endorsed as already suggested, the consignee would have been entitled to claim damages in the first instance from the Railway Company, leaving the Company to enforce their legal remedy against the sender under the risk note, is one which does not arise on the facts as they stand. As a matter of fact I have a little doubt that any consignee, claiming damages under the circumstances suggested, would, in his own interests, have impleaded both the Railway Company and the sender and would ordinarily, at any rate, have obtained a decree against the sender alone, the latter having accepted all responsibility for the condition of the consignment when placed in the hands of the Railway Company. As the case stands, I am clearly of opinion that the defendant Company have made themselves liable in damages to the plaintiff by their conduct, when delivery was asked for by the latter. Even supposing that there was some misunderstanding between the parties at Bareilly, and that neither the plaintiff consignee nor the local officials of the Railway Company in charge of the consignment clearly appreciated their respective rights and liabilities, I think the defendant Company should definitely have offered the plaintiff facilities for weighing the consignment on the spot before requiring him to part with the railway receipt. I hold them liable in damages partly for this reason, partly for their long delay in returning a definite answer to the plaintiff's claim and partly for having sold the consignment at auction under circumstances which did not warrant the adoption of that course. The application before me raises no serious question as to the amount of the damages awarded and consequently I do not discuss this point. The result is that the application fails and I dismiss it with costs.

Application dismissed.

MAKHDOOM BAKHSH SHAH *v.* HASHIM ALI.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 538 OF 1914.
April 22, 1915.
Present:—Mr. Justice Piggott.
MAKHDOOM BAKHSH SHAH AND OTHERS—DEFENDANTS—APPELLANTS
versus
HASHIM ALI—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), *s.* 9—*Suit for possession based on possessory title—Defence—Defendant's right to set up title.*

A suit in ejectment on the basis of possessory title is maintainable against any person who cannot show title in himself, apart altogether from the provisions of section 9 of the Specific Relief Act. The difference is that in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under section 9 of that Act has expired, the defendant will be allowed to plead his title and to prove it, if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. [p. 211, cols. 1 & 2.]

Pemraj Bhavaniram v. *Narayan Shivaram Khisti*, 6 B. 215; *Wali Ahmad Khan* v. *Ajudhia Kandu*, 13 A. 537; A. W. N. (1891) 196; *Gobind Prasad* v. *Mohan Lal*, 24 A. 157; *Ismail Ariff* v. *Mahomed Ghous*, 20 C. 834; 20 I. A. 99, referred to.

Second appeal from the decision of the District Judge of Azamgarh, dated the 3rd February 1914.

Mr. *Shafi-u-zaman*, for the Appellants.

Dr. *S. M. Suleman*, for the Respondent.

JUDGMENT.—This is one of those second appeals in which the only real difficulty is to ascertain with certainty what facts the lower Appellate Court intended to find, or must be taken to have found. The suit was one for recovery of possession over a certain plot of land and a tree situated thereon. If I rightly understand the pleadings there never was any question of title, strictly so called, in issue between the parties. The land in question is situated in the *abadi*, or inhabited site, of an agricultural village, and the proprietors of the soil are no doubt the *zamindars* of the village. The plaintiff alleged that he had been for many years in actual possession and occupation of the land in suit, having erected a thatched hut thereon and possessing the rest of the land, not actually covered by the suit, as a courtyard appertaining to the same. He further alleged that, during his absence from the village, the defendants, without any sort of right or title, had demolished the hut which belonged to him and taken possession of the land and of the tree, erecting a shed of their own on some portion of the land. The defendants' reply was that the plaintiff had never been in possession, that they had never dispossessed him, but that on the contrary they themselves had been in possession and occupation of the land for many years. The first Court found that the plaintiff had failed to prove any title to the land in himself, and, upon this finding alone, dismissed the suit. One of the grounds expressly taken by the plaintiff when he appealed to the Court of the District Judge was that he was entitled to a decree on proof of the fact of his possession. At the hearing of the appeal by the District Judge, a question of procedure arose which has to some extent complicated the case. The defendants themselves in the Court of first instance had pleaded that the land in suit had, many years previously, been occupied by the residential house of a tenant named Reoti. They alleged that the said Reoti had died many years prior to the institution of the suit, leaving no heir, and that they had themselves occupied the site ever since the time of Reoti's death. In connection with this plea the plaintiff produced in the Court of first instance a mortgage-deed in his favour purporting to be executed by this Reoti Kahar. The learned Munsif seemed to have thought that the production of this document could not help the plaintiff's case, because there was nothing in his plaint to indicate that he claimed possession of the land in suit on the strength of any title as a mortgagee. He also held that the document had not been sufficiently proved by the evidence of the scribe, Uttam Lal. The learned District Judge has not clearly stated that he held this document to be proved; but there is a passage in his judgment which shows that he regarded it as evidence of the fact of the plaintiff's possession. The document is unregistered, and the transaction was one of usufructuary mortgage for a sum of less than Rs. 100 so that it could have been effected at the date in question without execution of any document. Under the circumstances the learned District Judge was entitled to hold it proved, and he seems to have so held, that Reoti, who was admitted

before him to have been the former occupier of the land in suit, had transferred, or purported to transfer, whatever rights of occupation he possessed to the plaintiff by way of usufructuary mortgage. What the learned District Judge has, in my opinion, undoubtedly found is that, on the evidence as a whole the fact of the plaintiff's being in possession, and of his wrongful dispossession by the defendants at or about the date alleged in the plaint, is satisfactorily proved. On this finding he has decreed the plaintiff's suit. The contentions before me in second appeal are substantially three. *One* is to the effect that there has been no clear finding by the lower Appellate Court on the fact of the plaintiff's possession and with regard to his dispossession by the defendants. This plea is to my mind concluded by a perusal of the judgment of the lower Appellate Court. The *second* point taken is that the unregistered mortgage by Reoti in favour of the plaintiff was not legally proved. I think, under the circumstances of the case, there was evidence on the record upon which the lower Appellate Court was entitled to come to the finding which I have already set forth. The *third* point taken is that the lower Appellate Court made an entirely new case for the plaintiff. This has been argued before me on the assumption that the learned District Judge must be taken to have decreed the plaintiff's claim as a claim for recovery of possession under section 9 of the Specific Relief Act. There is authority for the proposition that a suit for recovery of possession based upon title should not be allowed to be converted into one under section 9 of the Specific Relief Act. I do not think however, that the learned District Judge has offended against this principle. The argument addressed to me on behalf of the defendants-appellants overlooks the fact that there can be a suit in ejectment on the basis of possessory title, maintainable against any person who cannot show title in himself, apart altogether from the provisions of section 9 of the Specific Relief Act. The difference is that, in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under section 9 of that Act has expired, the defendant will be allowed to plead his title, and to prove it if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. Authority for these propositions may be found in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (1), *Wali Ahmad Khan* v. *Ajudhia Kandu* (2), *Gobind Prasad* v. *Mohan Lal* (3) and *Ismail Ariff* v. *Mahomed Ghous* (4). As I have already pointed out, the present suit is one in which title, other than what may be called possessory title, was not set up by, and was not in fact vested in, either of the parties, I do not think that the decision of the learned District Judge is open to objection upon any of the grounds taken. I dismiss this appeal with costs.

Appeal dismissed.

(1) 6 B. 215.
(2) 13 A. 537; A. W. N. (1891) 196.
(3) 24 A. 157.
(4) 20 C. 834; 20 I. A. 99

CALCUTTA HIGH COURT.
APPEAL FROM ORDER NO. 311 OF 1913.
February 8, 1915.
Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.
KESHAWE SURENDRA SAHI AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS
versus
Rani DEVENDRABALA DASI—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90, O. XXXII, r. 3—Application to set aside sale on ground of fraud and collusion, maintainability of—Minor substituted as judgment-debtor—Guardian ad litem not appointed—Sale, effect of.

On the death of a judgment-debtor an application for substitution of the name of the sole legatee of the judgment-debtor, a minor, and his father and others was made. No application was made under Order XXXII, rule 3, of Civil Procedure Code, for the appointment of a guardian *ad litem*. The father acted throughout and eventually the property was sold and purchased by the decree-holder. The mother, acting as the guardian and next friend of the minor, applied to have the sale set aside under section 47 and Order XXI, rule 90, Civil Procedure Code, alleging fraud and collusion:

KESHAWE SURENDRA SAHI *v.* DEVENDRABALA DASI.

Held, that under the circumstances of the case the mother was entitled to make the application and that she should be appointed guardian *ad litem* of the minor. [p. 213, col. 1.]

Held, further, that the sale of the property without appointing such a guardian was in itself an irregularity which would vitiate the sale, if it caused injury to the minor. [p. 213, col. 1.]

Appeal against an order of the Subordinate Judge, first Court of Saran, dated the 4th of June 1913.

Babus *Mohendra Nath Roy* and *Rajendra Prosad*, for the Appellant.

Dr. *Ghosh* and Babu *Girija Prosonna Rai Chowdhury* and *Uma Charan Saha*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J.—In this appeal the appellant is a minor. He had, on the 10th July 1912, applied under section 47 and Order XXI, rule 90, of the Civil Procedure Code, to set aside the sale of his properties in execution of a decree on the ground of irregularities resulting in inadequacy of the price fetched at the sale. This petition was put in on his behalf by his mother as guardian and next friend of the minor.

The decree that brought about the sale was a mortgage-decree, the mortgagor being Baboo Shyam Surendra Sahi, the uncle of the minor. Shorty after the first execution petition the mortgagor died and thereafter on the 22nd March 1909, an application for substitution was made by the decree-holder. The present appellant is the sole legatee of his uncle, the mortgagor, under a Will. The above application was that the name of the minor, along with that of his father, Hari Harendra Sahi, and some others should be substituted. No application, however, was made under Order XXXII, rule 3, for the appointment of a guardian *ad litem* of the minor. Nor does it appear that any such order was ever made under the above provisions. But on the above application by the decree-holder substitution was made, but the minor was not described in the amended execution petition as being under the guardianship of his father. The minor in this amended execution petition was simply named and described as a minor. It is admitted, however, that the father began to act as guardian of his minor son and he did act as such in the previous stages of the execution proceedings and the Court allowed him to act as such. The father, as already observed, was himself one of the substituted judgment-debtors. The father of the minor has another son by another wife and this son is married to the sister of the present Maharaj Kumar of Hutwa, and it is the Hatwa Raj which is the purchaser at the sale.

It appears that there were five execution proceedings. The last ended in the sale of the properties.

The sale was fixed for the 3rd June 1912 which was a public holiday, and the Court was closed on that day. On the 4th June, *i. e.*, on the re-opening day, a petition was put in only on behalf of the father of the minor, under a *vakalatnamah* executed only on behalf of the father. In the body of the petition it is mentioned that by the arrangement suggested in the petition the minor would also be benefited. But it is clear that so far as this petition goes, the minor was not represented. By this petition the Court was informed that the Maharani of Hatwa was willing to purchase the properties at the sale on behalf of her ward, the Maharaj Kumar of Hatwa, and as for that end she had to move the High Court, the sale should be postponed for a week.

This petition also waived the right to demand a fresh proclamation by stating that the sale proclamation had been duly published and served. The sale was postponed and was fixed for the 11th June. The sale proclamation had notified that 48 *mahals* had to be sold. In the ordinary course these *mahals* should have been put up one by one and not in one lot. On the 11th June, before the sale, an application was put in on behalf of the minor alone without stating who acted for him as guardian. The scribe of this petition is one Sridhar Lal, who is an agent of the minor's father (Vide *vakalatnamah*, dated 1st June and filed on the 4th June). There is a little difference in the name. In the petition he signs as Sridhar Lal and in the *vakalatnamah* as Sridhar Prosad. We have been assured that it is one and the same man. It is a matter for inquiry. Let us now examine this petition of the 11th June, wherein the minor is not at all represented. Contrary to the notification in the proclamation of sale, the prayer in this petition is that all the *mahals* (48 in number) should be sold in one lot because there were big and monied

men who wished to purchase the *mahals*. The Subordinate Judge accepted the prayer and all the 48 *mahals* were sold in one lot and purchased by the Hatwa Raj.

On the 10th July 1912 the mother of the minor, styling herself as the guardian and next friend of her minor son, applied under section 47 and Order XXI, rule 90, of the Code on various allegations of fraud and collusion, but the learned Subordinate Judge rejected that petition on the ground that so long as the minor's father, who had acted as guardian throughout the execution proceedings for four years, is not removed from his office, the mother had no *locus standi* to make the petition.

If the learned Subordinate Judge had only taken the trouble of reading the petitions of the 4th and the 11th June, he would have found that the minor was not at all represented in these petitions.

It is admitted that no application for the appointment of a guardian was ever made and no such order was ever passed. The father was never formerly appointed guardian, and I do not see how one could ask the Court to remove a man from guardianship who was never appointed by the Court. On the application of the decree-holder filed on the 22nd March 1909, it was the imperative duty of the Subordinate Judge, after making some inquiry, to appoint a proper person as a guardian of the minor to act for him in the execution proceedings. No such thing was done. A number of authorities have been placed before us by the respondents showing that when a person, although not formally appointed, has acted for the minor throughout a proceeding or a suit, the Court ought to hold that the minor was represented. But in the present proceedings the minor was not represented by his father as already pointed out.

We hold that, in the circumstances stated above, the mother was entitled to make this application and that she should be appointed guardian *ad litem* of the minor. The sale of the property without appointing such a guardian is in itself an irregularity, which will vitiate the sale if it has caused injury to the minor. Accordingly we remand the case under Order XLI, rule 23, for disposal on the merits. The Subordinate Judge must decide whether any irregularities, other than that mentioned above, have been proved, and whether, if so, the minor has been injured, either by the irregularity to which we have referred or by those found by the Subordinate Judge. Costs will abide the result.

COXE, J.—I agree.

Case remanded.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1119 OF 1914.

February 25, 1915.

Present:—Justice Sir George KNOX, KT.

MUHAMMAD HASAN ASKARI—DECREE-HOLDER—APPELLANT

versus

NIAZ HUSAIN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution—Power of execution Court to complete an ambiguous decree—Decree, ambiguity in.

Where a decree is incomplete and ambiguous, it is not the duty of the Court executing the decree to complete it and to give a definite expression to the ambiguity. [p. 215, col. 1.]

Pirbhu Narain Singh v. *Rup Singh*, 20 A. 497: A. W. N. (1898) 93; *Liladhar* v. *Chaturbhuj*, 21 A. 277; A. W. N. (1899) 64; *Ram Lapit Ram* v. *Chooaram*, 4 C. L. R. 97, referred to.

Execution second appeal from the decision of the Subordinate Judge of Allahabad.

The Hon'ble Mr. *Abdul Raoof*, for Mr. *Rahmat Ullah*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The Munsif of Allahabad passed a decree in the following terms: "It is ordered and decreed that the plaintiff's claim, for pre-emption, be dismissed with costs as against all the defendants with the exception of defendants Nos. 5 and 6, that the plaintiff's claim for pre-emption, in respect of the shares of defendants Nos. 5 and 6, if any in the property in dispute, be decreed; and that if the plaintiff deposits for payment to defendants Nos. 5 and 6, within one year from this date, the proportionate amount of the consideration money, equal to the price of the shares of defendants Nos. 5 and 6, with reference to the entire consideration money, Rs. 780, specified in the sale-deed, then on his so depositing the aforesaid money, he (the plaintiff) shall be entitled to get possession over the shares of defend-

ants Nos. 5 and 6, if any, in the property in dispute."

That decree was neither taken into appeal nor has it in any way been altered since it passed.

The decree-holder applied to execute the decree, and in his application he asks that he may be put into actual and formal possession of the shares in the *zemindari* property sought to be pre-empted, being the share of *Musammat* Sakina Bibi and Kaniz Bano Bibi specified below. He then goes on to say that under the orders embodied in the decree, he had deposited in Court Rs. 102-14-9, and he sets out, as the share over which he asks to be put in possession, a share amounting to 17 *karants* in *Mauza* Manauri, *Patti* Hub-bun-nisa, *Pargana* Chail.

The Munsif of Allahabad, in whose Court this application was filed, at once found himself face to face with objections. These objections were several in number. One of them was that the decree-holder sought to execute the decree not against the property of Sakina Bibi and Kaniz Bano Bibi, but against the property of the heirs of Abid Husain; and further that the ladies above-mentioned had no interest in the property pre-empted, this share had not been set apart or specified in the decree; also that their share could not be determined in the execution department and the decree was not a decree which could be executed.

The learned Munsif went into the questions raised and the nature of the questions which he had to determine will be seen from the issues which he framed. He set himself to decide whether a Muhammadan father or a Muhammadan son had died first? Whether certain shares had been transferred before the pre-emption by an award of arbitrators? Whether an application to have the award filed in Court was rejected? Whether the proportionate amounts of consideration which the decree-holder had to pay, were matters to be considered in execution proceedings?

After wading through these troubled waters he arrived at the conclusion that the plaintiff was entitled to a decree for possession over 125 *sihams* out of 1152 *sihams* of the whole property inherited by these ladies provided the pre-emptor deposited Rs. 84-10-2 within a certain time. One has only to contrast the decree passed by the Munsif of Allahabad on the 31st of January 1911 with the order passed by the Munsif of Allahabad on the 3rd October 1912, to see that the real decree in the suit was that passed on the 3rd of October 1912 and not that passed on the 31st January 1911. The decree passed in January 1911 was not an adjudication conclusively determining the rights of the parties with regard to matters in controversy between the parties in suit, it left many of those matters undecided and the decree-holder, armed with the decree of the 31st January, had a decree which the learned Subordinate Judge before whom the matter went in appeal afterwards found incapable of execution.

The appeal before me contests the finding of the Subordinate Judge, and says that that Court was in error when it held that the decree passed in January was a decree incapable of execution. The learned Counsel for the decree-holder in support of the first plea taken by him in appeal, *i.e.*, that the decree in question was a decree capable of execution, cited in support of his argument the case of *Pirbhu Narain Singh* v. *Rup Singh* (1). The decree before the Court in that case was a decree for sale of property in which the decree-holder and the Courts were at arm's length as to whether the decree gave or did not give the decree-holder interest after a certain date. This Court held that the decree was clear and unambiguous on this question and that the executing Court was bound to execute it according to its terms.

I was next referred to the case of *Liladhar* v. *Chaturbhuj* (2). That was a case in which the Court executing the decree took upon itself to decide whether the decree, as it stood, was or was not a valid decree, whether it was or was not rightly passed. In both cases the Courts had before them a decree and there can be no question that when a Court is asked to execute a decree, its business is to execute that decree according to the terms contained in the decree, and not to question

(1) 20 A. 397; A. W. N. (1898) 93.
(2) 21 A 277; A. W. N. (1899) 64.

whether the decree was a decree passed by a Court having jurisdiction or whether some of the terms of the decree had not been erroneously entered in the decree. What the Court did in this case was to take up an incomplete decree, the terms of which were ambiguous, and to proceed to complete the decree and to give a definite expression to the ambiguity. I know of no provision of the Civil Procedure Code which allows the executing Court to do this.

The case before me seems to be in accord with the case of *Ram Lapit Ram* v. *Ohooaram* (3). That was a decree passed under a *sulehnama* and the Court passed its decree blindly on the *sulehnama* without ascertaining matters which had been left unascertained by the *sulahnama*. As the learned Judges pointed out, disputes naturally arose when the decree was put into execution, and they held that a Court executing the decree was bound by the terms of the decree and it was only in cases provided for by sections 211 and 212 of the Civil Procedure Code then in existence (now Order XX, rule 12) that the Court is at liberty to determine the rights of litigants in proceedings taken after decree. As regards those rights the Calcutta High Court held that they could not in execution go into the question at all. The result is that this appeal is dismissed with costs.

Appeal dismissed.

(3) 4 C. L. R. 97.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 143 OF 1914.

May 7, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, Justice Sir P. C. Banerjee, KT., and Mr. Justice Tudball.

BIRJ KUMAR LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEO KUMAR MISSIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Occupancy holding—Mortgage before Agra Tenancy Act (II of 1901)—Relinquishment after Act, effect of.

Where an occupancy holding was usufructuarily mortgaged for good consideration before the passing of the Agra Tenancy Act and where the mortgagor after passing of the Act relinquished the holding to defeat the mortgagee's rights:

Held, that the relinquishment was ineffectual against the mortgagee.

Jai Gopal Narain Singh v. *Uman Dat*, 10 Ind. Cas. 573; 8 A. L. J. 695, approved of.

Second appeal from the decision of the District Judge of Benares, dated the 18th September 1913.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—The facts connected with this appeal are extremely simple. Prior to the passing of the Agra Tenancy Act an occupancy tenant purported to mortgage the occupancy tenancy. The term of the mortgage was 59 years. In the year 1911 the occupancy tenant entered into an arrangement with the *zemindar* to relinquish his rights. The Court below has found that the mortgage was for consideration and genuine. It has found that the object of relinquishment was to defeat the mortgagee's rights. The first Court dismissed the suit on the ground that the Civil Court had no jurisdiction. Mr. Dalal, District Judge, on appeal reversed the decree of the Court of first instance and granted the plaintiff a declaration that the relinquishment was ineffectual against him, and also granted an injunction restraining the *zemindar* from interfering with the plaintiffs' possession. In our opinion the decision of the Court below was correct. It is fully covered by the decision of this Court in the case of *Jai Gopal Narain Singh* v. *Uman Dat* (1), with which we still agree. We dismiss the appeal with costs including in this Court fees on the higher scale. The objection is disallowed with costs.

Appeal dismissed; Objection disallowed.

(1) 10 Ind. Cas. 573; 8 A. L. J. 695.

TEPU MAHAMMAD *v.* TEFAYIT MAHAMMAD.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 3922 OF 1913.
February 10, 1915.
Present:—Mr. Justice Richardson and
Mr. Justice Mullick.
TEPU MAHAMMAD—PLAINTIFF—APPELLANT
versus
TEFAYIT MAHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Issue, new, raising of, in Appellate Court—De facto *landlord, possession as*—*True owner, suit brought by, for ejectment*—*Encroachment of land by tenant*—*Presumption.*

It is always dangerous to allow a new issue to be raised at the appellate stage. [p. 216, col. 2.]

Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner. [p. 216, col. 2]

Where a tenant of *A* encroaches on the adjoining land of *B*, as between *A* and his tenant, there is a presumption that the encroachment enures to *A*'s benefit, and becomes an accretion to the tenant's holding under *A*. [p. 216, col. 2.]

A tenant will ordinarily hold the land upon which he has encroached as tenant of his landlord and in that case the landlord may perhaps be described as his *de facto* landlord. [p. 217, col. 1.]

Nuddyarchand Shaha v. *Meajan*, 10 C. 820, followed.

But that would not prevent the true owner of the land encroached upon from bringing a suit for the purpose of recovering his possession. [p. 217, col. 1.]

Appeal against the decree of the Subordinate Judge of Zillah Jalpaiguri, dated the 21st May 1913, reversing that of the Munsif at that place, dated the 19th December 1911.

Babu *Jogendra Nath Ghose*, for the Appellant.

Babu *Tarakeshwar Pal Chowdhury*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—The suit relates to two plots of land. It has been found, and is not now disputed, that the plaintiff has a good title to the land as a lessee under the *zemindar*, the Maharaja of Cooch Behar. Defendants Nos. 2 to 4 are *jotedars* and their land adjoins the land in dispute. Defendant No. 1 is admittedly a tenant under defendants Nos. 2 to 4 in respect of the land comprised within their *jote*. The suit was brought by the plaintiff to eject defendant No. 1 from the disputed plots of which he is in possession. Defendants Nos. 2 to 4 do not contest the plaintiff's claim.

It appears that defendant No. 1 is *prima-facie* a trespasser and that the plaintiff is entitled to succeed, unless some such defence as adverse possession for the statutory period can be established. The first Court decided the suit upon the simple consideration that defendant No. 1, not having been in possession for more than five or six years, was a trespasser. The Munsif, therefore, decreed the plaintiff's claim. The learned Subordinate Judge in the Court of Appeal below took a different view. In the first place, he allowed defendant No. 1 to raise a new issue. It is always dangerous to allow a new issue to be raised at the appellate stage, and the learned Subordinate Judge seems in this connection to have been betrayed into error. The new issue runs as follows: "Having *bona fide* held as tenant of persons who were their *de facto* proprietors, has the defendant acquired any right, occupancy or non-occupancy, in the disputed land"? The issue was apparently framed with reference to the decision of the Full Bench of this Court in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (1). Some exception, however, may be taken to the mode in which the issue is worded. The question it was intended to raise was not whether the defendants Nos. 2 to 4 were the *de facto* landlords of the defendant No. 1, but whether they were the *de facto* proprietors of the disputed land and in that capacity settled it with that defendant. Where a person has been in possession of a particular estate or a particular portion of an estate as *de facto* landlord, it may be that *raiyats* settled by him on the land would have a good answer to a suit for ejectment brought by the true owner, but to carry the principle laid down by the Full Bench to the extent to which it has been carried in this case is to go much too far. There seems, indeed, to have been some confusion in the Subordinate Judge's mind between this principle and another principle on which the Courts have acted. Where a tenant of *A* encroaches on the adjoining land of *B*, no doubt as between *A* and his tenant there is a presumption that the encroachment enures to *A*'s benefit and becomes on

(1) 20 C. 708.

accretion to tenant's holding under *A* [*Nuddyarchand Shaha* v. *Meajan* (2)]. The tenant will ordinarily hold the land upon which he has encroached as tenant of *A* and in that case *A* may perhaps be described as his *de facto* landlord. But that is a very different thing from saying that the land was settled with the tenant by *A* as *de facto* proprietor and in such circumstances as those indicated, there would be nothing to prevent *B*, the true owner of the land encroached upon, from bringing a suit for the purpose of recovering possession from *A* and his tenant. Similarly in the case before us the learned Subordinate Judge has not found that the disputed land was in fact in the possession of defendants Nos. 2 to 4, nor has he found that the disputed land was included within the area settled with defendant No. 1 by defendants Nos. 2 to 4. No case is made, therefore, for the application of the principle of the Full Bench decision. That principle only applies where *raiyats* are settled upon land by a person in *de facto* possession as landlord, who is afterwards found to have no title. It is not applicable in every boundary dispute or in every case where a question of parcel or no parcel arises. It is obvious that the learned Subordinate Judge was wrong in allowing a new case to be made in appeal and that he had no clear conception of the limitations of the principle on which he founded his decision.

There remains the question of limitation. In the course of his judgment the learned Subordinate Judge says that the defendant No. 1 has been in possession for the last 10 or 15 years. This is an extremely vague finding upon an important question, which should have been the subject of precise decision. It is impossible for us to say upon the judgment, as it stands, whether the learned Subordinate Judge is of opinion that defendant No. 1 had or had not acquired any title upon the footing of adverse possession. This is the subject of the first two issues framed by the first Court and if the Subordinate Judge had confined himself to those two issues and had come to an express finding upon them, his judgment would probably have been more satisfactory. As the matter stands, in my opinion the judgment and decree appealed from must be set aside and the suit remanded to the lower Appellate Court in order that the appeal thereto may be re-heard upon the issues originally settled.

Costs will abide the result.

MULLICK, J.—I agree.

Decree set aside; Case remanded.

(2) 10 C. 820.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 146 OF 1914.

March 19, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Mr. Justice Piggott.

PURAN NATH SADHAK—PETITIONER APPELLANT

versus

ATWARGIR—OPPOSITE PARTY—RESPONDENT.

Provincial Insolvency Act (III of 1907), s. 4 (b)—Collusive suit—Subsequent withdrawal—Act of insolvency.

A collusive suit and subsequent withdrawal from or compromising of the same, with the express object of putting another party in possession of immoveable property, amounts to a transfer of property by an insolvent within the meaning of clause (*b*) of section 4 of the Provincial Insolvency Act, 1907. [p. 218, col. 1.]

First appeal from an order of the District Judge of Saharanpur.

Mr. *Nihal Chand*, for the Appellant.

JUDGMENT.—This is an appeal arising out of the dismissal of an application in insolvency. The applicant was a creditor of the respondent, Atwargir. The applicant alleged that the said Atwargir was indebted to him in a sum far exceeding Rs. 500, and further, that Atwargir had committed an act of insolvency by transferring certain property with intent to defeat the applicant's claim. It was alleged that the transfer was effected in the following manner: that Atwargir brought a collusive suit claiming certain property from one *Musammat* Baldevi, which suit he proceeded to compromise in such a manner that a decree might be passed having the effect of leaving *Musammat* Baldevi in possession of the property and preventing Atwargir from ever claiming the same from her. On notice being issued to Atwargir, the latter presented an application admitting the debts

set forth by the applicant and asking for an enquiry by the Insolvency Court. The District Judge has dismissed the application, holding that there has been no act of insolvency on the part of the debtor, Atwargir. He has done this without any inquiry into the facts. He seems to have been of opinion that under no circumstances could the institution of a collusive suit and subsequent withdrawal from or compromising of the same, even though this transaction was carried out with the express object of putting another party in possession of immoveable property, amount to a transfer of property by an insolvent within the meaning of clause (*b*) of section 4 of the Provincial Insolvency Act, III of 1907. We do not accept this view of the law. In our opinion the Court below should have made an enquiry into the facts alleged by the petitioner and should have disposed of the application in accordance with the result of that enquiry.

We set aside the order complained of and remand the case to the Court below, with directions that it be re-admitted on to the file of pending applications and be disposed of on the merits. Costs of this appeal will be costs in the cause.

Order set aside; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1532 OF 1913.

March 24, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

Musammat LAKHPATI—DEFENDANT—APPELLANT

versus

RAMBODH SINGH- -PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by widow—Attestation of deed by reversioner, whether amounts to consent of reversioner—Attestation, when assent—Question of fact—Existence of daughter, whether bar to suit for declaration by reversioner.

The presence of a daughter is no bar to a suit for declaration, by a reversioner to the estate of a Hindu widow that an alienation made by her is void. [p. 219, col. 1]

Mere attestation of an instrument by a reversioner does not necessarily import concurrence by him. It may, no doubt, be shown by other evidence that when the reversioner became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. [p. 219, col. 1.]

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry*, 13 M. I. A. 209: 12 W. R. (P. C.) 47; 3 B. L. R. (P. C.) 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 Eng. Rep. 529, followed.

The question whether the attestation of a document should be held to be simply assent is a question of fact and must be determined with reference to the circumstances of each case. [p. 219, col. 2.]

Deno Nath Das v. *Kotiswar Bhattacharya*, 21 Ind Cas 367; *Mewa Singh* v. *Bhagwant Singh*, 5 Ind. Cas. 252, followed.

Second appeal from the decision of the District Judge, Benares, dated the 17th May 1913.

Dr. *S. C. Banerji*, for the Appellant.

The Hon'ble Dr. *Tej Bahadur Sapru* (with him. Dr. *S. N. Sen*), for the Respondent.

JUDGMENT.—The facts of this case are that *Musammat* Kulwanti, the widow of a separated Hindu, Jita, mortgaged her husband's property to the appellant by two deeds of January 25th, 1907, and August 7th, 1908. At the time of these transactions there were living Sarju Dei, who is said to be a daughter of Jita, Budhai, the son of a deceased brother of Jita, and Ram Raj and Ram Bodh, sons of another deceased brother of Jita. The three nephews were the sole presumptive reversionary heirs of Jita. Ram Bodh was a minor living in union with his brother, Ram Raj, who joined in executing both mortgages, and Budhai attested both as a witness Ram Bodh who is still a minor brought this suit in 1910 for a declaration that the mortgages were not binding upon him. The Subordinate Judge held that the earlier mortgage was not proved to have been made for lawful necessity at all, and that the later mortgage was proved to have been made for lawful necessity to the extent of Rs. 282 out of Rs. 800, but he held that Ram Bodh was bound by his elder brother's consent to the transactions, and that Budhai's consent to them was proved by the fact that he attested them. Therefore, the whole body of male reversioners must be taken to have consented to the transactions, and the plaintiff was not entitled to challenge them. On appeal the District Judge agreed with the first Court as to the extent to which the mortgages had been shown to be

supported by legal necessity, but he held that the attestation of the deeds by Budhai did not prove that he had consented to the mortgages and that the plaintiff was not bound by the elder brother's consent, because it had been neither alleged nor proved that he had acted for the benefit of the plaintiff. Both Courts below have held that the presence of a legitimate daughter of Jita, even if proved, did not prevent the plaintiff from maintaining the suit. The learned District Judge gave the plaintiff a declaration that the earlier deed was not binding upon him and that the later was binding only to the extent of Rs. 282. This is a second appeal by the mortgagee. On the authorities it is quite clear that the presence of the daughter, even if proved to be legitimate, is no bar to the maintenance of the suit by the plaintiff.

It appears to us that the only difficulty in the case arises from the finding of the District Judge that the attestation of the deeds by Budhai does not prove that he consented to the transactions. If Budhai consented to them, then we have the consent on the part of all the adult male reversioners, and it is clear that such consent is sufficient to raise the presumption that the mortgages were made for purposes binding upon the whole body of reversioners. It is contended on behalf of the plaintiff respondent that the finding of the District Judge, that Budhai is not proved to have consented to the mortgages, is a finding of fact which cannot be disturbed in second appeal, while the appellant contends that it is not a finding of fact but that the question is, what is the true conclusion to be deduced from the fact that Bodhai attested the execution of the mortgages. In our opinion the finding of the learned Judge is one of fact which cannot be disturbed in second appeal. In a well-known case decided as long ago as 1869 their Lordships of the Privy Council said that mere attestation of an instrument by a person did not necessarily import concurrence by him. It might no doubt be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference did not necessarily arise [*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (1)] and it has been held, in several cases by different Courts in India, that the question whether the attestation of a document should be held to simply assent is a question of fact, and must be determined with reference to the circumstances of each case, see for example *Deno Nath Das* v. *Kotiswar Bhattacharya* (2) and *Mewa Singh* v. *Bhagwant Singh* (3).

We must, therefore, accept the finding that Budhai is not proved to have assented to the transactions in question, and it follows that it is not proved that there was such assent on the part of the reversionary body as to raise a presumptiion that the mortgages were made for purposes binding on the reversioners. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 13 M. I. A 209; 12 W. R. (P. C) 47; B. L. R. (P. C.) 157; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 Eng. Rep. 529.

(2) 21 Ind. Cas. 367.

(3) 5 Ind. Cas. 252.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREES NOS. 1434 AND 1524 OF 1911.

January 4, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Mullick.

BAID NATH SAHAY—PLAINTIFF—APPELLANT (IN BOTH CASE)

versus

IN NO. 1434 OF 1911

NANKU MAHTON AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN NO. 1524 OF 1911

DUBRI MAHTON AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 32 (2)—Relevant fact—Ordinary course of business—Appellate Court, powers of—Settlement papers, admission of, after first Court's decision.

There is nothing in section 32, clause 2, which requires any formal proof that certain papers were kept as a fact in the ordinary course of business. [p. 220, col. 1.]

Settlement papers cannot be admitted by the Appellate Court after the first Court's decision in the case. [p. 220, col. 1.]

COLLECTOR OF MEERUT *v.* UMRAO SINGH.

Kesowji Issur v. *Great Indian Peninsular Railway Company*, 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347 34 I. A. 115; 31 B. 381 (P. C.), referred to and followed.

MacDonald v. *Babu Lal Purbi*, 4 C. L. J. 519, distinguished.

Appeals against the decrees of the Subordinate Judge, Patna, dated the 17th of February 1911, modifying that of the Munsif, Behar, dated the 29th of August 1910.

Dr. *Rash Behari Ghose*, Babus *Provash Chandra Mitter* and *Roy Guru Charan Prosad*, for the Appellant.

Babus *Karunamoy Bose* and *Kulwant Sahay*, for the Respondents.

JUDGMENT.—This second appeal arises out of a claim for recovery of arrears of rent and cesses. The only portion of the claim which is in dispute before us is the *bhowli* rent, and that is disputed both as regards the method of collection, namely, whether it is *bhowli danabandi* or *bhowli batai*, and as regards the share of the landlord.

With regard to the *first* point, it is urged before us in appeal that the lower Court was wrong in excluding the *dibi* papers, which were admitted in the first Court without objection and which were proved to be in the handwriting of the deceased *patwari*, whose duty it certainly was to keep the *dibi* papers. We think that the learned Subordinate Judge was wrong in excluding those papers. There is nothing in section 32, clause (2), which requires any formal proof that the papers are kept as a fact in the ordinary course of business. He appears to have confused section 32, clause (2), with section 34 with which we have nothing to do in this case. The case will, therefore, have to go back on this ground alone for the learned Judge to re-decide the question of *danabandi* or *batai* on a consideration of those *dibi* papers as evidence in the case.

Then, again, we are of opinion that he is wrong in having admitted the Settlement papers after the Munsif's decision in the case. His action appears to be contrary to the principle laid down by their Lordships of the Judicial Committee in the case of *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1) and the authority, which the learned Subordinate Judge cites, *MacDonald* v. *Babu Lal Purbi* (2), is clearly distinguishable, the record having there been filed after the institution of the suit but before the case had been decided in the first Court, while it was still open to the parties to use the record as evidence in the case. But it is obvious that such evidence cannot be admitted in appeal, so as to induce the learned Subordinate Judge to shift the onus in appeal to the plaintiff without remanding the case and to hold that the Munsif was wrong in not deciding the case differently upon evidence which was not before him. We, therefore, must direct that the Settlement record be excluded from the purview of the Judge in appeal.

As regards the question of the rate of division, we find that this is concluded by the finding of fact in the judgment with regard to Exhibit A. This is a finding which sets aside the Munsif's finding on a pure ground of fact and we cannot go behind it. It must be taken for the purpose of this case that the *hakimi* share is half the produce.

The result is that so much of the decree of the learned Subordinate Judge which decides the land as held *bhowli batai* must be set aside, and the case remanded to him for a fresh decision on the point in accordance with the directions contained in this judgment.

Costs will abide the result.

This judgment will also govern Second Appeal No. 1524 of 1911.

Case remanded.

(3) 31 B. 381 (P. C.); 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347; 34 I. A. 115.

(3) 4 C. L. J. 519.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 380 OF 1913.

March 23, 1915.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

THE COLLECTOR OF MEERUT—DEFENDANT—APPELLANT

versus

UMRAO SINGH—PLAINTIFF—RESPONDENT.

Guardian ad litem—*Mother acting as such*—*Decree*

COLLECTOR OF MEERUT *v.* UMRAO SINGH.

validity of—Mother not defending suit, if sufficient ground to set aside decree.

The father of the plaintiff was murdered leaving his widow and the plaintiff, a minor, him surviving. The motive of the murder was to take possession of property which belonged to the plaintiff's father. Suits had to be brought in the name of the minor. The mother of the minor borrowed on mortgages on behalf of the plaintiff as his guardian for the expenses of the suit. Suits were thereafter brought on these mortgages and decrees were obtained. The plaintiff sued to set aside these decrees:

Held, that the mother was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court and that if the decrees were fairly and properly obtained against the minor as represented by his mother, the decrees were binding and the Court could not go behind them. [p. 221, col. 2.]

Held, further, that the mere fact that the mother did not defend the suits on the mortgages would not make the decrees invalid. [p. 221, col. 2.]

First appeal from a decree of the Subordinate Judge of Moradabad.

Mr. *A. E. Ryves*, for the Appellant.

Mr. *D. C. Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff, Umrao Singh, for a declaration that certain decrees which had been obtained against his mother as his guardian were not binding upon him. The suit was instituted in April 1912. The estate of the defendants was taken over by the Court of Wards in February 1913. The Court below made a decree in part in the plaintiff's favour on the 13th of May 1913. The Collector was never made a party to this suit and it is doubtful perhaps whether the decree was quite regular. It is, however, unnecessary to consider this point, having regard to the position which Mr. Ryves has taken up in the present appeal on behalf of the Court of Wards. When the Collector came to know of the decree of the Court below, he filed the present appeal against the decree. Mr. Ryves has stated at the outset that he waives any irregularity and that he is willing to argue the case on the merits, just as he would have done had the Collector been made a party and the decree had been regularly made against him. It appears clearly from the evidence and admitted facts that the father of the plaintiff, one Bahal Singh, was murdered leaving his widow and the plaintiff him surviving. One Parsa helped the widow against her adversaries. The supposed motive of the murder was to take possession of property which belonged to Bahal Singh. After the murder of Bahal Singh a suit had to be brought in the name of his minor son, which was fought right up to the High Court. The costs, which were allowed under the decree of the High Court, amounted to Rs. 793. It is clear that this does not at all represent the actual money that had to be expended in the course of that litigation alone. Besides this, however, there were mutation proceedings in the Revenue Court which were, apparently, contested. There was also a riot case in which undoubtedly money was expended. We have no doubt that money was also expended in connection with the prosecution of the murderer of Bahal Singh. It is in connection with these expenses that the money was borrowed on mortgages executed by the mother on behalf of the plaintiff as his guardian. Suits were brought on foot of these mortgages and decrees were obtained in 1909 and 1910. It is to set aside these decrees that the present suit is brought.

There are two aspects of the case. *First* as to whether the decrees obtained against the plaintiff with the widow as his guardian do not bind him. The widow was his natural and *de facto* guardian. *Prima facie* she was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court. She had no interest adverse to him. So far as the evidence goes, she had been most active in taking steps to protect the minor's property. If the decrees were fairly and properly obtained against the minor, as represented by his mother, then the decrees are binding and the Court ought not to go behind them. The only suggestion of the decrees being improper is that the widow did not defend the suits. The total amount borrowed was a sum of Rs. 2,100. The expenditure upon the matters to which we have already referred must have been very considerable. It is possible that if the widow had defended the suits brought on foot of the mortgages and put the plaintiff to strict proof of legal necessity for each and every item, she might, possibly, have succeeded in having some small item struck out. Defending the suits would probably have cost much more than the item disallowed. In our opinion it is impossible to hold, under the circumstances of the present case, that the decrees, even though *ex parte*, were in any

way improperly obtained. If this be so, it is quite unnecessary to go into the other matters and to consider whether the defendants have been able to show that there was legal necessity for every part of the consideration for the bonds. In our opinion the decree of the Court below was erroneous and must be set aside.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 578 OF 1914.

April 16, 1915.

Present:—Mr. Justice Chamier.

RAGHUBIR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TULSHI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

U. P. Land Revenue Act (III of 1901), ss. 106, 110, 111, 112, applicability of—Imperfect partition—Proprietary title—Civil Court, jurisdiction of.

Sections 110, 111, 112 of the Land Revenue Act do apply to imperfect partitions and, therefore, the rule to the effect that a party to a partition proceeding who has had the opportunity of pleading a question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does apply to proceedings taken for imperfect partition. [p. 223, col. 1.]

Nathi Mal v. *Tej Singh*, 29 A. 604; A. W. N. (1907) 190; 4 A. L. J. 578, referred to.

Aisha Begam v. *Abdullah Khan*, A. W. N. (1899) 190, distinguished.

Second appeal from the decision of the Subordinate Judge of Farrukhabad, dated the 2nd February 1914.

Mr. *B. N. Vyas*, for the Appellants.

Mr. *A. P. Dube*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the appellants for a declaration, that they are entitled to a one-sixth share in a certain *patti*. The prayer for relief is not worded in this way but this is the meaning of it. The lower Appellate Court has declined to make such a declaration, but has made a declaration of another description intended to limit the rights of the respondents in a certain way. On the facts as found by the lower Appellate Court the appellants are entitled to the share which they claimed and the only question is whether they are entitled to obtain a declaration to that effect in the Civil Court. It appears that in the *khewat* of 1305 *Fasli* the plaintiffs were shown as entitled to a three-eighteenths share and the respondent Tulshi Ram was shown as entitled to an eight-eighteenths share. At the recent Settlement by some mistake a record was prepared showing that the appellants are entitled to no more than a one-sixteenth share while the respondent Tulshi Ram is shown as entitled to an eight-sixteenths share. Thus the appellants' share has been reduced and the respondent Tulshi Ram's share has been increased. The only defence with which I am concerned now is that the appellants might and ought to have put forward their claim in certain partition proceedings and as they did not do so, they are not entitled to maintain the present suit. It is a fact that partition proceedings were instituted to which the appellants were made parties, the usual proclamation was issued and a date was fixed by which those concerned were required to state their objections, if any, to the partition. The appellants had an opportunity of putting forward their objections, but did not do so. They may have been misled by an order of another Revenue Court passed on an application for the correction of the *khewat*. That Court was not satisfied that the record was incorrect and rejected the present appellants' application to have it altered, saying that their remedy lay in the Civil Court. The fact that another Revenue Court in another proceeding suggested that the appellants should proceed by way of a suit in a Civil Court, did not relieve the appellants from the necessity of putting forward their claim in the partition proceeding. It was contended in the lower Appellate Court, and it has been contended before me, that the rule laid down in a number of cases in this Court, including that of *Nathi Mal* v. *Tej Singh* (1), to the effect that a party to a partition proceeding, who has had the opportunity of pleading a

(1) 29 A. 604; A. W. N. (1907) 190; 4 A. L. J. 578.

question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does not apply to the case of an application for imperfect partition. Reliance is placed on the decision of this Court in *Aisha Begam* v. *Abdullah Khan* (2). In that case Knox and Aikman, JJ., dealing with a plea similar to that put forward by the respondent Tulshi Ram in the present case, said "the answer to this plea is that while it is true that on an application for perfect partition a case may arise on which, under sections 112 and 113 of the N.-W. P. Land Revenue Act, there can be a decision which would have the effect of finally determining the conflicting claims, the same result cannot take place in a case of imperfect partition. In the case of an imperfect partition any objection, would, with reference to the last clause of section 134 of the N.-W. P. Land Revenue Act, put the applicant for partition out of Court". Without expressing any opinion as to the correctness of the construction placed in that case on the proviso to section 134 of the Act of 1873, I think it is sufficient to say that that proviso finds no place in the present Land Revenue Act (Local Act III of 1901). Section 106 of the present Act provides that the procedure prescribed in Chapter VII of the Act shall be followed in all partitions, whether perfect or imperfect, except where it is otherwise expressly declared. The sections with which we are concerned in the present case are sections 110, 111 and 112. It is not declared that these sections do not apply to imperfect partitions. I must, therefore, hold that they do apply to imperfect partitions and that the rule laid down by so many decisions of this Court, with reference to objections which might have but have not been put forward in the partition proceedings, applies under the present Act to proceedings taken for imperfect partition as well as to proceedings taken for perfect partition. For these reasons I am of opinion that the first relief claimed by the appellants in the present suit cannot be granted to them by the Civil Court, I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(2) A. W. N. (1899) 190.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 25, 1915.

Present:—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

MOTABHOY MULLA ESSABHOY—DEFENDANT—APPELLANT

versus

MULJI HARIDAS—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso 2—Suit on promissory note—Written contract—Oral agreement—Burden of proof—Conditional admission in pleadings—Objection under the section taken for first time in Court of Appeal—Pleadings, amendment of.

It is allowable under section 92 of the Evidence Act, 1872, to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, but such oral agreement must be clearly proved and the onus lies on him who sets it up. [p. 227, col. 1.]

If an admission in pleading is made subject to a condition, it must either be accepted subject to the condition or not accepted at all. [p. 227, col. 2.]

The plaintiff sued the defendant upon a promissory note, jointly executed by the defendant and one *H*, for Rs. 50,000 payable on demand, alleging that under a certain agreement the plaintiff was bound to pay *H* Rs. 50,000 on 30th January 1908, but he agreed to prepay that amount on being given the joint promissory note in question of date 23rd December 1907, and the money was handed over to the defendant; that the plaintiff agreed that he would surrender the note if on 30th January 1908 *H*, who was largely indebted to him, had given sufficient security for the whole debt as then due by him: that on the 30th January no such sufficient security was given that accordingly he was entitled to maintain defendant's liability under the note. The defendant admitted the execution of the note, but pleaded that it was verbally agreed that his liability on it should cease on the 30th January 1908. The trial Judge allowed the parties to go to trial and examine witnesses. At the trial the defendant's true contention was that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the amount to be paid by the plaintiff to *H* on that date, and that the note should be re-placed by a single acknowledgment on the part of *H*. The trial judge, coming to the conclusion that it had not been proved that any

agreement had been made for the giving of security by *H*, gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at, because the promissory note constituted a written contract binding the defendant to pay on demand and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement:

Held, that if the defendant's pleading was to be dealt with in absolute strictness, the view of the Court of Appeal was right; but that his true contention, when put in the form of averment, would be an oral agreement in terms of proviso 2 to section 92, which would allow it to be proved. [p. 227, col. 1.]

Held, also, that inasmuch as the view of the Court of Appeal might have been obviated by a mere amendment of the pleadings and as the parties had been allowed to go to proof, the evidence led should be considered: and that as the defendant failed to discharge the onus that lay on him of proving the oral agreement set up by him, the suit must be decreed. [p. 227, cols. 1 & 2.]

Appeal from a decree of the High Court at Bombay in its Appellate Civil Jurisdiction (October 8th, 1912), reversing a decree of the same High Court in its Original Civil Jurisdiction (April 11th, 1912).

FACTS.—The suit was instituted by the plaintiff-respondent on the 15th December 1910 to recover from the defendant-appellant the sum of Rs. 50,000 with interest from the date of the suit, upon a promissory note which was in terms the following:—

"*Bombay*, 23*rd December* 1907.

On demand we M. M. Essabhoy & Hyderally Cassumji Sons & Co. jointly and severally promise to pay to Mulji Haridas or order the sum of Rs. fifty thousand (50,000) for value received.

M. M. Essabhoy.
Hyderally Cassumji Sons & Co."

The circumstances under which the said note was executed are stated in their Lordships' judgment. The plaintiff in his plaint, after setting out those circumstances, alleged that he agreed to prepay Rs. 50,000 which was due from him on the 30th January 1908, on being given the said promissory note, and the money was handed to the defendant, and that he (the plaintiff) had also agreed that if full security for the whole of the debt then due to him was furnished by the said Hyderrally Cassumji Sons & Co. before the end of January 1908, the defendant should be discharged from all liability from the said note; but that inasmuch as that condition had not been complied with, the defendant's liability under it continued. The defendant admitted the execution of the note and the consideration therefor, but pleaded that it was verbally agreed that his liability thereunder was automatically to cease on the 30th January 1908.

On these pleadings the learned trial Judge (Davar, J.,) allowed the parties to go to trial and examine witnesses. It then appeared that defendant's true case was that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of Rs. 50,000 to be paid by the plaintiff to Hyderally Cassumji Sons & Co. on that date, and that the note should be re-placed by a single acknowledgment on the part of the said Hyderally Cassumji.

The learned Judge accepted the defendant's story and dismissed the suit with costs. The material passages from his judgment are the following:—

"I have no doubt that before he (plaintiff) gave his Rs. 50,000 on the 23rd of December 1907, he did complain that his securities were not sufficient and he was unwilling to pay on that day, but he allowed the importunities of Cullianji * and Abdool Hoosein † to prevail and eventually agreed and did make the payment. I have no doubt that he then complained that Abdool Hoosein had not kept his promise of securing him and equally I have no doubt that Abdool Hoosein gave him assurance that within a few days or weeks he would have more title deeds or make some payment. But it is quite clear to my mind that the defendant Essabhoy was no party whatever to any of these assurances or promises. f Cullianji, in his anxiety to secure his brokerage and oblige Abdool Hoosein at the same time, did make any false representations to Mulji about the defendant agreeing to any conditions such as are sought to fasten on him, the defendant is in no way responsible for them. Abdool Hoosein appeared to me on the

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* A broker employed by Hyderally Cassumji Sons & Co.

† An active partner of Hyderally Cassumji Sons & Co.

whole to be a truthful witness and I do not think he would have been a party to any such representation so far as the defendant is concerned. But it is possible that Cullianji may have made statements to Mulji and to Mr. Devidas* about the defendant agreeing to extend his liability till such time as more title-deeds were deposited, in order to allay Devidas's apprehensions and silence any objection on his part. So far as the defendant is concerned I have come to an unhesitating conclusion, that in signing this promissory note he merely acknowledged receipt of payment to him of moneys which were rightfully his but which were paid a few weeks in advance of the day on which they should have been paid, and that he signed that promissory note in question on the distinct understanding that his liability would terminate on the 31st January 1908, when he was unquestionably entitled to claim payment from Hyderally Cassumji Sons & Co. and when Mulji under his agreement was bound to pay that identical sum to Hyderally Cassumji Sons & Co., for the purpose of paying over the sum to the defendant..... I have tested the evidence with the fact before my mind that the plaintiff was the holder of a promissory note duly signed by the defendant and that,* therefore, *prima facie* he was entitled to recover from the defendant unless the defendant proved the existence of circumstances which absolved him from his liability. This onus has been fully discharged by the defendant and discharged to my entire satisfaction..... I find that the defendant's liability on the promissory note in the plaint mentioned ceased and terminated on the 31st of January 1908 and that he is not liable to pay the sum of Rs. 50,000 claimed in this suit to the plaintiff."

On plaintiff's appeal (Scott, C. J., and Chandavarkar, J.) held that as the suit was a suit on a promissory note, section 92 of the Evidence Act, 1872, precluded the defendant from proving his defence, which was based on a contemporaneous oral agreement inconsistent with the promissory note. The decree of the Court below was accordingly set aside and the suit was decreed with costs. The reasons for their judgment were as follows :—

"The plaint in the suit stated certain circumstances under which the promissory note had been passed and in effect alleged an agreement between the parties under which, if a certain condition was performed by Hyderally Cassumji Sons & Co., the liability on the note would cease.

"The defendant put in a written statement denying the allegation of the plaintiff as to the contemporaneous agreement. He alleged certain other circumstances under which the note had been issued, and stated in paragraph 6 that it was agreed that the liability of the defendant on the said note should cease on the day on which the last of certain payments for Rs. 50,000 previously mentioned became due, that is, on the 30th January 1908, the plaintiff, as above stated, having agreed to advance the money to pay the amount of the said instalment to the defendant on that day. That is an allegation of a contemporaneous oral agreement inconsistent with the promissory note, being an allegation of an agreement that although the note purports to be a note without any limitations payable upon demand, it is in effect a note the liability on which is to cease on a particular date, the 30th January 1908, not subject to any condition depending upon human agency, but merely on the expiration of a certain limited period of time which is not mentioned in the promissory note. That, it appears to us, is an agreement which cannot be proved having regard to the terms of section 92 of the Evidence Act, and it is the only defence to the claim on the promissory note which is before the Court in this appeal.....In our opinion any discussion of the evidence is unnecessary, because upon the face of the pleadings in support of which the evidence was adduced, no legal defence is forthcoming to the claim on the promissory note.

"We, therefore, reverse the decree of the lower Court and pass a decree for the plaintiff for Rs. 50,000 with interest at 6 per cent. per annum from the date of the suit and costs throughout. Interest on judgment at 6 per cent per annum."

The defendant, thereupon, appealed to His Majesty in Council.

Messrs. *Upjohn*, *K. C.* and *E. B. Raikes*, for the Appellant:—Section 92 of the Evidence Act, 1872, applies only when the whole of the agreement is reduced to writing. But here

*Plaintiff's solicitor.

the parties admittedly did not reduce the whole of the contract to writing, and the case, therefore, falls within the second proviso to the section.

[Mr. AMEER ALI referred to *Bholanath Khettri* v. *Kaliprasad Agarwalla* (1).]

It is submitted that the learned Judge was right in allowing the case to go to trial. He disbelieved the plaintiff's story, and was, therefore, right in dismissing the suit.

Reference was also made to section 91 of the Evidence Act.

Sir *Robert Finlay, K. C., and Mr Lowndes*, for the Respondent, referred to *Pym* v. *Campbell* (2); *Wallis* v. *Littell* (3), and Taylor on Evidence, 10th Edition, paragraphs 1132 and 1135, and submitted that the Court of Appeal came to the right conclusion in deciding that the appellant was prevented under section 92 of the Evidence Act from setting up an oral agreement. They also submitted that even if the appellant could set up an oral agreement, the burden of proving it was on him, and that he had failed to discharge that onus.

Mr. *Upjohn, K. C.*, in reply, referred to *Holt* v. *Miers* (4), *Lindley* v. *Lacey* (5) and *Khoo Sit Hoh* v. *Lim Thean Tong* (6).

JUDGMENT.

LORD DUNEDIN.—The plaintiff-respondent, Mulji Haridas, sues the defendant-appellant, Motabhoy Mulla Essabhoy, upon a promissoy note jointly executed by the defendant and the firm of Hyderally Cassumji Sons & Co., hereinafter called Hyderally, for Rs. 50,000. The note was made in the following circumstances. Mulji, before July 1907, had made advances to Hyderally amounting in all to Rs. 4,00,000, the consideration for making such advances being certain shares in an agency commission in a certain Company. The advances were partially but not wholly covered by security. In July 1907, Hyderally applied for a futher advance of Rs. 1,50,000 in order to pay off Motabhoy a debt of that amount due to him. Mulji agreed to make the loan, a condition being an increased share in the commission agency, and to make it in three equal instalments. Two of these instalments were paid and the money handed on by Hyderally to Motabhoy and the third instalment fell to be paid on 30th January 1908.

At the end of December 1907 Motabhoy was in want of money to meet a bill. He accordingly applied to Hyderally to ask if the balance of the debt, namely, Rs. 50,000, could be paid immediately. Hyderally then approached Mulji to see if he would prepay his instalment due on the ensuing 30th January. He consented to do so, on being given the joint promissory note in question of date 23rd December 1907, and the money was handed to Motabhoy. So far there is no discrepancy between the view of the parties, but now arises the difficulty. The defendant Motabhoy alleges that it was agreed that upon the arrival of the 30th January 1908 the advance made under the promissory note should be held as the advance of the instalment promised to be paid by Mulji to Hyderally on that date and that the note should be replaced by a single acknowledgment on the part of Hyderally. The plaintiff Mulji says that all he agreed to was that he would surrender the note if at 30th January 1908 Hyderally had given sufficient security for the whole debt as then due by him, that on the 30th January no such sufficient security was given, that accordingly he is entitled to maintain Motabhoy's liability under the note.

The learned Judge of first instance allowed the parties to go to trial and examine witnesses; and coming to the conclusion that it had not been proved that any arrangement had been made for the giving of security by Hyderally, gave judgment in favour of the defendant. The Court of Appeal took the view that no witnesses should have been examined and that the testimony could not be looked at, because in their view the promissory note constituted a written contract binding the defendant to pay on demand, and section 92 of the Evidence Act, 1872, prevented any oral agreement being set up to contradict that written agreement.

(1) 8 B. L. R. 89 at p. 92.
(2) (1856) 6 El. & Bl. 370; 25 L. J. Q. B. 277; 2 Jur. (N. S.) 641; 4 W. R. 528; 119 E. R. 903; 106 R. R. 622.
(3) (1861) 11 C. B. (N. S.) 369; 31 L. J. C. P. 100; 8 Jur. (N. S.) 745; 5 L. T. 487; 10 W. R. 192; 132 R. R. 591; 142 E. R. 840.
(4) (1839) 9 Car. & P. 191.
(5) (1864) 34 L. J. C. P. 7; 17 C. B. (N. S.) 578; 10 Jur. (N. S.) 1108; 11 L. T. 273; 13 W. R. 80; 142 R. R. 525; 144 E. R. 232.
(6) (1912) A. C. 323; 81 L. J. P. C. 176; 136 L. T. 476.

Now if the defendant's pleading is to be dealt with in absolute strictness that view is right, for what the defendant says is this: he admits the execution of the note, and then he says that it was verbally agreed that his liability on it should cease on the 30th January 1908. That is a bald averment of a verbal contract contradicting the written contract and would be inadmissible under section 92. But this bald averment does not represent the defendant's true case. His true contention has been already stated, and in the form of averment it might be put thus: "It was agreed that on 30th January 1908 the advance then to become due by Mulji to Hyderally should be held as made by the moneys paid on 23rd December 1907, and that the liability under the note should be held as satisfied by a fresh note to be granted by Hyderally for the advance of 30th January 1908." That would be an agreement in terms of proviso 2 to section 92 which allows to be proved "the existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms."

Their Lordships have felt that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings, and that in a case where the parties had been allowed to go to proof. They have, therefore, felt themselves entitled to consider the evidence led.

Although, however, there are cases, of which this is one, where it is allowable to urge an oral agreement which will have the effect of leaving matters otherwise than if they had depended on the written agreement alone, it is obvious that such oral agreement must be clearly proved and that the onus lies on him who sets it up. Their Lordships are of opinion that this has not been sufficiently realised by the learned Judge of first instance. Coming to the conclusion that the plaintiff had failed to prove that he had stipulated for security being given for the whole debt by Hyderally by the 30th January, the learned Judge takes it as a necessary *sequitur* that the defendant's case is established. But the agreement alleged by the defendant must be substantively proved, and it is here, in their Lordships' judgment, that the defendant fails. The agreement must be an agreement to which the plaintiff Mulji is shown to have assented, either himself or by an agent with power to bind him. Now there was no one who had power to bind Mulji. Further, Motabhoy and Mulji never met at the time at which the alleged agreement was concluded and there is absolutely no evidence which shows that Mulji ever consented to anything except to advance the money if he got the promissory note. In the argument the defendant's Counsel sought to put his case thus: He said that Mulji himself admitted in his pleading that the promissory note was not to represent the true state of matters after 30th January, that no doubt he adhibited the condition that security was by that date to be given, but that as the Judge of first instance disbelieved the story that any such condition was made, the matter rested on his own confession that the promissory note lost its efficacy after 30th January. The fallacy here consists in so treating an admission. It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition it must either be accepted subject to the condition or not accepted at all. Therefore, the admission that the promissory note was to be held as satisfied on 30th January by a new debt on the part of Hyderally, provided that security was found for the whole debt by that date, cannot be treated as an admission that in any case the promissory note was to be held as satisfied by 30th January.

Their Lordships are, therefore, of opinion that the decree of the Court of appeal was right, although to be supported on other grounds than those stated in the judgment of that Court, and they will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Ranken Ford, Ford and Chester.*

Solicitors for the Respondent: Messrs. *T. L Wilson & Co.*

RANGAMMAL *v.* SEVAUGAN CHETTI.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 531 OF 1912.

December 1, 1914.

Present:—Mr. Justice Sankaran Nair.

RANGAMMAL—CLAIMANT—PETITIONER

versus

SEVAUGAN CHETTI MINOR, BY HIS GUARDIAN, CHOCKALINGAM CHETTI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908) s. 15—Attachment—Claim to attached property—Question of possession not decided—Power of High Court to interfere—Possession in one's own right—Release from attachment.

Where a Court has disposed of a case without deciding a question (*e. g.*, the question of possession in a claim case) which under the Code of Civil Procedure it is bound to decide for a proper disposal of the case, the High Court will interfere under section 115 of the Code. [p. 228, col. 2.]

Where it was found that the properties attached were purchased in the names of the judgment-debtor and the claimant, that the entire purchase-money was paid by the claimant only, and that he had been in sole possession of the properties for the last ten years or more:

Held, that the claimant was entitled to get the properties released from attachment. [p. 228, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Namakal, in Execution Appeal No. 482 of 1912 (Execution Petition No. 343 of 1912, in Original Suit No. 480 of 1909).

Mr. *T. Narasimha Aiyangar*, for the Petitioner.

Mr. *K. R. Subramania Sastri*, for the Respondent.

JUDGMENT.—The District Munsif has not found who is in possession of the property. He only assumes that the petitioner's husband was in possession. Without a finding as to who is in possession this matter cannot be disposed of. If the petitioner is in exclusive possession of the property in her own right, she is entitled to get the properties released from attachment. If she is in possession of the property only as a joint tenant or a tenant-in-common, *i.e.*, on her own behalf and on behalf of the judgment-debtor, the decree-holder is entitled to attach and sell the judgment-debtor's interest in the property. With reference to the above observations, the Munsif will return a finding after taking evidence on the question of possession. Mr. K. R. Subramania Sastri argues that the matter is not one for interference under section 115 of the Civil Procedure Code. Where the District Munsif has disposed of a case without deciding a question which under the Code of Civil Procedure he is bound to decide for a proper disposal of the case, this Court ought to interfere under section 115 of the Civil Procedure Code. The finding should be submitted within six weeks and seven days will be allowed for filing objections.

FINDING.—The High Court has directed me to submit a finding in this matter on the following question:—

Who is in possession of the attached property, and if the petitioner, whether she is in exclusive possession in her own right, "Or only as a joint tenant or a tenant-in-common."

Evidence was recorded on both sides and on giving it the best consideration I could, I come to the conclusion that the attached properties were in [the possession of the petitioner on the date of attachment and that such possession was not exclusive possession in her own right but only a possession, which, in the circumstances to be referred to below, can amount to one on behalf of the judgment-debtor and as a tenant-in-common with him.

* * * * * * *

JUDGMENT.—The properties were originally purchased in the name of the judgment-debtor, Dorasami Aiyangar, and his nephew, Rajam Aiyangar, the claimant's husband, by a sale-deed, Exhibit H, dated 13th October 1900. A decree-holder of the uncle, Dorasami Aiyangar, attached his interest in April 1912. The claimant seeks to get the properties released from attachment. The District Munsif finds that from a date subsequent to May 1902 and prior to 1903-1904, Rajam Aiyangar, claimant's husband, should have obtained possession and ever since, Rajam Aiyangar and his widow, the claimant, have been in possession. He also finds that the entire purchase-money payabe under Exhibit H was paid by Rajam Aiyangar only. But he holds that as there was no registered instrument of sale by Dorasami Aiyangar in favour of the husband, she should, be held to be only a tenant-in-common with Dorasami Aiyangar though in possession of the entire properties. On the facts found by the District Munsif the claimant is entitled to have the properties released from attachment. She is as a fact in sole possession in her own right. I accord-

ingly reverse the order of the lower Court, direct the attachment to be raised and the properties released from attachment. The petitioner is entitled to the costs in this Court, including the costs of the fresh inquiry. The parties will bear their own costs in the lower Court.

Appeal allowed.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

February 25, 1915.

Present:—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

THE BOMBAY COTTON MANUFACTURING COMPANY, LTD.—DEFENDANTS—APPELLANTS

versus

Raja Bahadur MOTILAL SHIVLAL—PLAINTIFF—RESPONDENT.

Evidence—Oral—Weight to be given to opinion of trial Judge—Duty of Court of Appeal—Cross-examination to credit—Relevancy—Credibility of witness.

On appeal the whole case, including the facts, are within the jurisdiction of the Appellate Court: but generally speaking it is undesirable to interfere with the findings of fact of the trial Judge who sees and hears the witnesses and has an opportunity of noting their demeanour especially in cases where the issue is simple and depends on the credit attached to one or the other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. [p. 230, col. 2.]

Where the issue is simple and the only question is which set of witnesses is to be believed the verdict of the Judge trying the case should not be lightly disregarded. [p. 231, col. 1.]

Cross-examination to credit is necessarily irrelevant to any issue in an action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case where everything depends on the Judge's belief or disbelief in the witness's story. [p. 231, col. 1.]

Where the Judge who heard the evidence rejected the story of a witness declaring that he had seldom seen in the box a more "thoroughly unscrupulous, untrustworthy, untruthful man" than the witness, but the Court of Appeal accepted the witness's story saying that the cross-examination of the witness which convicted him of being a party to a false and fraudulent balance sheet, was "not a very relevant point," and that witness was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers".

Held, that the Court of Appeal ought not to have excused the witness and actually accepted his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts. [p. 231, col. 1.]

Appeal from a judgment and decree of the High Court of Bombay in its Appellate Jurisdiction (February 5th, 1912), reversing those of the same Court in its Ordinary Original Civil Jurisdiction (July 24th, 1911.)

FACTS.—The plaintiff-respondent instituted the suit on the 6th April 1910 to recover from the defendants-appellants two lacs of rupees, lent on deposit for a fixed period which expired in September 1909, with interest. He claimed to set off a sum of Rs. 93,139-11-10, the sale-proceeds of certain cotton in the hands of the plaintiffs. The amount claimed was Rs. 1,23,769-11-3 and further interest. The defendant Company admitted the loan, but counter-claimed in respect of two lacs of rupees repaid to the plaintiff on May 27th, 1909, for a subsequent loan on deposit of that sum made on December 28th, 1908. The defendants contended that the subsequent loan was not a genuine transaction, but that it was a fraud upon the defendant Company contrived between the plaintiff by his manager one Dwarkadas Dharamsey, at that time agent for the said Company. They also contended that upon the accounts being properly taken there was a balance due to them, together with the value of 125 bales of cotton deposited with the plaintiffs, and counter-claimed in respect thereof.

Beaman, J., who tried the case, gave judgment in favour of the defendant Company, and after the accounts were taken, made a decree in its favour directing the plaintiff to pay to it the sum of Rs. 1,17,633 with interest and costs. But the Court of Appeal (Scott, C. J., and Russell, J.) reversed the judgment and decree of the Court below, gave judgment in favour of the plaintiff, and made a decree directing the defendant Company to pay to the plaintiff Rs. 1,01,295 with interest and costs of the suit and appeal. The defendant Company thereupon preferred the present appeal.

Messrs. *Upjohn*, *K. C.*, and *Dunne*, for the Appellants, on the question of the weight to be attached to opinion of the trial Judge as regards the credibility of witness, referred to *Khoo Sit Hoh* v. *Lim Thean Tong* (1), *Alice* v. *Princess Alice* (2) and *Montgomerie & Co.*, v. *Wallace-James* (3); and submitted that the judgment of the Court of first instance should be restored.

Sir *Robert Finlay*, *K. C.*, and Messrs. *Brown* and *Rakes*, for the Respondent, referred to sections 157 and 159 of the Evidence Act, 1872, and submitted that the judgment appealed from was right.

The appellants were not called upon to reply.

JUDGMENT.

SIR GEORGE FARWELL.—This is an appeal from a judgment and decree of the High Court of Bombay in its appellate jurisdiction reversing a judgment of the High Court in its original jurisdiction. The question at issue is one of fact. The respondent is a banker and money-lender against whom personally no imputation is made; his manager was one Dani. Dani was on intimate terms with one Dwarkadas, and Dwarkadas was for some years, until his death in August 1909, agent and Managing Director of the appellant Company, and of two other Companies, the Tricumdas and the Lakhmidas; in 1908 the appellant was a flourishing and solvent Company, and the two other Companies were largely insolvent and both were heavily indebted to the respondent for advances to the amount of about $5\frac{1}{2}$ lacs. The respondent was pressing Dwarkadas for further and better security in respect of these sums, and also of other moneys advanced by the respondent to Dwarkadas personally; and Dani and Dwarkadas accordingly arranged to shift part of the indebtedness of the Tricumdas and Lakhmidas Companies on to the appellant Company. This arrangement was carried out by entries which can only be characterised as a barefaced swindle. Dani procured two cheques, one from the Tricumdas Company for Rs. 85,000 and one from the Lakhmidas Company for one lac and Rs. 15,000 and, sent them over by his son to the office of the appellant Company to be placed to their credit, but simultaneously Dwarkadas through his son Devji Damodar telephoned to the cashier of that Company not to present the cheques, but to await further instructions; the two amounts were entered in the appellants' books to their credit and appear as:—"Rs. 85,000 cheque 1 in number drawn on the Bank of Bombay (bearing) No. 95,500 S.S., and 1. 15,000 cheque drawn on the Bank of Bombay bearing No 7. 94950 S. S. No. 2." The two cheques were then destroyed by Dani's orders. It is difficult to suggest any object for this transaction of drawing and paying in cheques for the purpose of being entered with every circumstance of identification and reality, and then of immediate destruction without presentation except fraud. The transaction was merely a paper one for the purpose of shifting the respondent's security from the two insolvent to the one solvent Company. The Judge of first instance has heard the evidence, which depends on the credit to be attached to the two sons of Dwarkadas on the appellants' side, and to Dani on the respondent's; he has stated that he has seldom seen in the box "such serviceable, clear-headed and absolutely truthful witnesses" as the two sons or a more 'thoroughly unscrupulous, untrustworthy and untruthful man" than Dani, and he finds that the transaction was a deliberate fraud on the appellants. The Appellate Court refused to accept as conclusive the judgment of the lower Court as to the veracity of the witnesses. It is doubtless true that on appeal the whole case, including the facts, are within the jurisdiction of the Appeal Court. But generally speaking, it is undesirable to interfere with the findings of the trial Judge, who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses. Nor should his pronouncement with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. In making these

(1) (1912) A. C. 323 at p. 325; 81 L. J. P. C. 176; 106 L. T. 470.

(2) (1868) 2 P. C. 245 at p. 247; 38 L. J. Adm. 5; 19 L. T. 678; 17 W. R. 209.

(3) (1904) A. C. 73 at pp. 75, 83; 73 L. J. P. C. 25; 90 L. T. 1.

observations their Lordships have no desire to restrict the discretion of the Appellate Courts in India in the consideration of evidence. They only wish to point out that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of a Judge trying the case should not be lightly disregarded.

With all respect to the Appeal Tribunal, their Lordships cannot accept their reading of the facts and inferences. They find no such contradictions or impossibilities in the evidence of the two witnesses, whom the trial Judge in this case has believed, to justify their preferring the opinion of the Appellate Court formed on the written record to his deliberate conclusions after hearing it in Court. Again, several of the conclusions of fact adopted by the Appeal Court appear to their Lordships to be quite mistaken, *e.g.*, that Dani had no reason to fear and did not fear that the respondent would lose the money owing to him by the Tricumdas Company. It would serve no useful purpose to comment in detail on the judgment of the Appeal Court, but their Lordships feel bound to take exception to the Chief Justice's statement that the cross-examination of Dani, which convicted him of being party to a false and fraudulent balance sheet of the Tricumdas Company, was "not a very relevant point," and that Dani was prejudiced thereby by being placed "in an uncomfortable position and reduced to shuffling answers." The observation might be of disastrous effect, if accepted. Cross-examination to credit is necessarily irrelevant to any issue in the action, its relevancy consists in being addressed to the credit or discredit of the witness in the box so as to show that his evidence for or against the relevant issue is untrustworthy; it is most relevant in a case like the present where everything depends on the Judge's belief or disbelief in the witness's story: and to excuse him and actually accept his story on the ground that he was uncomfortable when he was shown to be a fraudulent falsifier of accounts is to adopt a course which their Lordships cannot follow.

Their Lordships will humbly advise His Majesty that the judgment of the Appeal Court be set aside and that of the High Court in its original jurisdiction be restored and that the respondent do pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent: Mr. *Latteys & Hart.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDERS NOS. 286 TO 290 OF 1913.

April 1, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

VENKATAPERUMAL RAJU BAHADUR VARU, RAJA OF KARVETNAGAR, MINOR, BY GUARDIAN, W. A. VARADACHARIAR—PETITIONER—APPELLANT

versus

VENKATA REDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908, ss. 47, 73, 104—Mortgage-decree making judgment-debtor personally liable for deficiency—Sale of other properties belonging to him—Application by decree-holders for rateable distribution—Order, whether appealable—Execution application praying for specific reliefs—No final orders passed—Madras Civil Rules of Practice, r. 167.

A party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure, should not be deprived of it unless the Civil Procedure Code expressly denies it to him. [p. 233, col. 1.]

Orders passed under section 73 of the Code of Civil Procedure are appealable if they affect parties to the suit especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by clause (2) of section 73. [p. 232, col. 2.]

Sundar Singh v. *Ghasi*, 18 A. 410; A. W. N. (1896) 126; *Krishnabhupati Devu* v. *Vikrama Devu*, 18 M. 13 at p. 17; *Vengappayyan* v. *Karimpanakal Parvati*, 26 M. 501; *Kali Prosanna Ghosh* v. *Golam Rahman*, 20 Ind. Cas. 790; 18 C. W. N. 910, followed.

Jagadish Chandra Shaha v. *Kirpa Nath Shaha*, 1 Ind. Cas. 783; 36 C. 130; *Kashi Ram* v. *Mani Ram* 14 A. 210; A. W. N. (1892) 56; *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee*, 27 Ind. Cas. 644; 42 C. 1; *Pungalur Chennamma* v. *Raja of Karvetinagar*, 23 Ind. Cas. 422; 1 L. W. 234, distinguished.

Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor, are decrees "*for the payment of money*" within the meaning of section 73 of the Code and entitle the mortgagee to apply for rateable distribution under that section. [p. 233, col. 2.]

VENKATAPERUMAL *v.* VENKATA REDDI.

Abdulla Sahib v. *Doctor Oosman Sahib*, 28 M. 224; *Gatti Lal* v. *Bir Bahadur Singh*, 27 A. 158; A. W. N. (1904) 200; 1 A. L. J. 562, followed.

Execution applications praying for specific reliefs which were all granted several years before assets were realised and on which no further reliefs could be asked or granted, are still on the file and undisposed of if no final orders have been passed taking them off the file of pending applications. [p. 234, col 1.]

Rule 167 of the Civil Rules of Practice, Madras, contemplates final orders being passed by the Court on a petition after the sale has been confirmed. [p. 234, col. 1.]

An objection that the decrees passed are not in accordance with law, cannot be raised in execution proceedings. [p. 233, col. 2.]

Appeals against the orders, dated 25th January 1913, of the District Court of North Arcot, in Civil Miscellaneous Petitions Nos. 893 to 901 and 904 of 1912 (Execution Petitions Nos. 124, 88, 133, 135 and 82 of 1905, in Original Suits No. 5 of 1897, No. 22 of 1889, No. 11 of 1889, No. 24 of 1889 and No. 11 of 1886), respectively.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Messrs. *M. Krishnamachariar*, *V. Parthasarathy Aiyangar* and *P. Venkataramana Rao*, for the Respondents.

These appeals coming on for hearing on the 19th March 1915, and a preliminary objection having been taken that the appeals do not lie the Court (Sheshagiri Aiyar and Kumaraswami Sastri, JJ.) delivered on the said preliminary objection the following

JUDGMENT.—The respondents in these connected appeals obtained mortgage decrees against the appellant. These decrees provided for the recovery of the balance from the person and the other properties of the judgment-debtor. Certain properties, not included in the mortgage to the respondents, were attached in execution of two other decrees against the same judgment-debtor; the realised assets were paid into Court. The present respondents applied for rateable distribution; notwithstanding the objection of the judgment-debtor, the applications were granted. The judgment-debtor has appealed. A preliminary objection is taken that as the order was passed under section 73 of the Code of Civil Procedure, against which no appeal is provided by section 104 of the Code, no appeal should be entertained. It is conceded that the question agitated in those applications *relates* to the execution of the decrees between the parties to the suits in which the decrees were passed. *Prima facie*, therefore, the order is appealable as falling under section 47 of the Code of Civil Procedure. Has that right of appeal been taken away in the present case by section 73? That section does not say that no appeal shall lie against orders passed under it. It is by the omission to provide for an appeal in section 104 that it is argued that an appeal is not given against the order. It has been held with reference to orders passed under Order XXI, rule 63, that if the adjudication was between the parties to the suit, although the matter may arise in a claim petition, an appeal will lie under section 47 of the Code of Civil Procedure. This principle was recognised both under the old and the new Codes: See *Sundar Singh* v. *Ghasi* (1), *Krishnabhupati Devu* v. *Vikrama Devu* (2), *Vengappayyan* v. *Karimpanakal Parvati* (3) and *Kali Prosanna Ghosh* v. *Golim Rahman* (4). On the analogy of these decisions, we are of opinion that orders passed under section 73 of the Code of Civil Procedure are appealable, if they affect parties to the suit. In *Jagadish Chandra Shaha* v. *Kirpa Nath Shaha* (5), *Kashi Ram* v. *Mani Ram* (6), the contest was between rival decree-holders. They are not governed by section 47 of the Code of Civil Procedure. This distinction was pointedly referred to in *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (7).

But our attention was drawn to the judgment of Sankaran Nair and Ayling, JJ., in *Pungalur Chennamma* v. *Raja of Karvetinagar* (8), which at first sight appeared to be a direct authority in favour of the respondents. In that case, the appellant was one of the decree-holders. To him the provision of clause (2) of section 73 of the Code of Civil Procedure will apply, and he can have his remedy by way of suit if the order goes

(1) 18 A. 410; A. W. N. (1896) 126.
(2) 18 M. 13 at p. 17.
(3) 26 M. 501.
(4) 20 Ind. Cas. 790; 18 C. W. N. 910.
(5) 1 Ind. Cas. 783; 36 C. 130.
(6) 14 A. 210; A. W. N. (1892) 56.
(7) 27 Ind. Cas. 644; 42 C. 1.
(8) 23 Ind. Cas. 422; 1 L. W. 234.

against him. The judgment-debtor cannot avail himself of the right of suit which that sub-clause provides. The present case may be distinguished from the case in *Rungalur Chennamma* v. *Raja of Karvetinagar* (8) on that ground. We think that a party to whom a right of appeal is given, if he comes under section 47 of the Code of Civil Procedure, should not be deprived of it, unless the Civil Procedure Code expressly denies it to him. As we find no such denial in section 73 of the Civil Procedure Code, we must hold that an appeal lies. We overrule—the preliminary objection.

The appeals then coming on for hearing on merits on the same day (19th March 1915) and having stood over for consideration till this day (1st April 1915), the Court delivered the following

JUDGMENT.

SESHAGIRI AIYAR, J.—I have had the advantage of reading the judgment which my learned brother is about to deliver. I entirely agree with his conclusions. The respondents are entitled to rateable distribution even though their decrees are on mortgages. The order for payment of the amount from the person and the other properties of the judgment-debtor was also obtained in these cases. See *Abdulla Sahib* v. *Doctor Oosman Sahib* (9) and *Gatti Lal* v. *Bir Bahadur Sahi* (10). It is not disputed that no formal order was passed disposing of their execution applications. Under the old Code of Civil Procedure, it was held that even when an application was "struck off", it must be taken to be still pending, as the law provided no procedure for taking such a step *Sasivarna Tevar* v. *Arulanandam Pillai* (11). In the present Code, there is an express provision for dismissing an execution application where no further step is taken by the decree-holder. It is clear, therefore, that until that step is taken under the new Code, the application is on the file of the Court. The fact that the decree-holder moved the Court only for a particular remedy open to him, cannot lead to the inference that he was not entitled to ask that his decree be satisfied by other means which the law enables him to adopt. The District Judge is right in treating the applications of the respondents as pending at the time that the claim for rateable distribution arose. These appeals must be dismissed with costs : There will be no costs in Civil Miscellaneous Application No. 289.

KUMARASWAMI SASTRI, J.—These are appeals against the orders of the District Judge of North Arcot declaring that the respondents are entitled to rateable distribution out of the sale-proceeds realized in Execution Petitions Nos. 78 of 1905 and 108 of 1906. The respondents obtained mortgage-decrees against the appellant, which directed that the judgment-debtors should be personally liable for any deficiency that may arise after the sale of the mortgaged properties and the application of the sale-proceeds towards the amount due on the decrees. Though the decrees were not in accordance with the provisions of the Transfer of Property Act, the irregularity cannot be questioned in execution proceedings. *Raja of Kalahasti* v. *Venkata Perumal Raja* (12). The respondents had, therefore, decrees for money and would be entitled to rateable distribution, if they had applied for execution and their applications were still undisposed of and on the file at the date when assets were realized in execution of the decrees in Execution Petitions Nos. 78 of 1905 and 108 of 1906. *Tiruchittambala Chetti* v. *Seshayyangar* (13).

The respondents in 1905 filed execution applications on the decrees obtained by them, which prayed for (1) issue of notices to the judgment-debtors under section 248 of the old Civil Procedure Code, and (2) sale of the mortgaged properties, leave being given to the decree-holders to bid. Orders were passed granting the reliefs, and it is admitted that the decree-holders obtained all the reliefs they had prayed for. For some reason or other (not explained) no formal orders were passed taking the petitions off the file of pending execution applications and the District Judge, treating the applications as pending, ordered rateable distribution on the applications of the decree-holders.

(9) 28 M. 224.
(10) 27 A. 158; A. W. N. (1904) 200; 1 A. L. J. 562.
(11) 21 M. 261; 8 M. L. J. 18.
(12) 12 Ind. Cas. 689; 21 M. L. J. 1036; (1911) 2 M. W. N. 458; 10 M. L. I. 429.
(13) 4 M. 383.

AMMASI KUTTI GOUNDEN v. APPALU.

The question for decision is whether execution applications praying for specific reliefs, which were all granted several years before assets were realized and on which no further reliefs could be asked or granted, can be said to be still on the file and undisposed of, because no final orders have been passed taking them off the file of pending applications.

The point is not free from difficulty. When an execution petition is filed, and the Court either rejects all or some of the prayers, it has to pass final orders to that effect. If all or any of the prayers are granted, the decree-holder has to obtain the appropriate reliefs by taking further steps, either on the execution petition or in interlocutory application on the execution petition. When he has obtained all the reliefs he asks for, all that remains to be done on the execution petition is to record the fact that the petition has been disposed of. The Court cannot do anything further. It is argued by Mr. Govindaraghava Aiyar that anything that the Court might do, after all the prayers have been granted and reliefs sought obtained by the decree-holder, will only be purely ministerial and for statistical and not judicial purposes.

There can be little doubt that only a formal order can be passed on the petition after all the reliefs prayed for have been granted and obtained by the decree-holder; but it does not follow that the order is not a judicial order simply because it records that the execution petition has been disposed of. Many purely formal orders are still judicial and not ministerial. The Madras Civil Rules of Practice contemplate final orders being passed on execution petitions. Rule 167 of the Civil Rules of Practice requires that, when orders for sale are passed, the execution petition shall be adjourned to a fixed date and clearly contemplates final orders being passed by the Court on the petition after the sale has been confirmed.

It was the duty of the Court to have fixed a date for the final disposal of the execution petitions, and the fact that it did not do so has the effect of keeping the applications pending till final orders are passed.

I am of opinion that the District Judge was right in treating the execution petitions as pending, and dismiss the appeals (except Civil Miscellaneous Appeal No. 289) with costs.

Appeals dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 346 OF 1914.

February 26, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

AMMASI KUTTI GOUNDEN—PLAINTIFF—PETITIONER

versus

APPALU *alias* KRISHNASWAMI NAICKEN - DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Patent error of procedure—Interference in revision—Suit on promissory note assigned by undivided son—Succession certificate, whether necessary—Question of want of certificate raised for the first time in appeal—Appellate Court's duty to give plaintiff an opportunity of producing certificate.

When a subordinate Court dealing with a suit of a small cause nature commits an error of procedure patent on the face of the record, the High Court will interfere in revision. [p. 235, col. 1.]

Subramania Pattar v. *Narayana Pattar*, 28 Ind. Cas. 189; 2 L. W. 230, followed.

Where an objection is taken for the first time in appeal that the suit on a promissory note should not have been decreed inasmuch as the plaintiff had not produced the succession certificate, the suit should not be dismissed but opportunity should be given to the plaintiff to produce the certificate. [p. 235, col. 1.]

Where an assignment is from an undivided son, no succession certificate is necessary, nor when the plaintiff sues on the ground that he is a holder in due course and not that a debt did really exist. [p. 235, col. 2.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the Temporary Subordinate Judge, Coimbatore, in Appeal Suit No. 228 of 1913, preferred against that of the District Munsif of Coimbatore, in Original Suit No. 172 of 1912.

Mr. *S. Muthiah Mudaliar*, for the Petitioner.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.

SPENCER, J.—An objection has been taken that this is not a case in which we can interfere in the exercise of our revisional

powers under section 115 of the Code of Civil Procedure.

An objection was taken only at the hearing of the appeal in the lower Court that no decree should have been passed when the plaintiff had not produced a succession certificate.

The Subordinate Judge thereon decided that there was no necessity to send the case back to the lower Court and proceeded to set aside the District Munsif's decree and to dismiss the plaintiff's suit.

In doing so the Subordinate Judge committed, in my opinion, an obvious error of procedure.

The objection having been taken at that late stage he should in fairness to the plaintiff have given him an opportunity of making good the defect brought to notice in the appeal. The matter does not stop there. Both the lower Courts having found that there was no debt, section 4 of the Succession Certificate Act does not apply to the facts of this case at all. Again both Courts having found that plaintiff was a holder in due course, having obtained a transfer of the suit promissory note from the undivided minor son of the promisee, represented by his mother and guardian, no succession certificate could have been granted to the plaintiff. The judgment of the Subordinate Judge is most unsatisfactory and he committed a clear error of procedure in dismissing the suit on his findings of fact.

As to the power of this Court to interfere when a subordinate Court dealing with a suit of a small cause nature commits an error of procedure patent on the face of the record, I am in accord with the views expressed by my learned brother in *Subramania Pattar* v. *Narayana Pattar* (1), which has the support of Full Benches of this Court in *Manisha Eradi* v. *Siyali Koya* (2) and *Vuppuluri Atchayya* v. *Sir Kanchumarti Venkata Seetarama Chandra Rao* (3) and of another Bench in *Anantha Lakshmi Ammal* v. *Kunnanchankarath Sankaran Nair* (4).

We set aside the lower Appellate Court's decree and remand the appeal for disposal in the light of the above observations. The petitioner will have his costs in this Court. The costs in the Courts below will be provided for in the revised decree.

SESHAGIRI AIYAR, J.—I entirely agree. The facts are these. The plaintiff claims to recover a sum of money by virtue of an assignment from the undivided son of the payee of a promissory note. It was found by both the lower Courts that no debt was due to the original payee; the Munsif gave a decree on the ground that as the plaintiff was a holder in due course, the fact that the defendant was not really indebted to the assignor's father, was no bar to the plaintiff recovering. In this view, there is no debt due to the father for which a certificate could have been obtained. If by a fiction of law, as argued by Mr. Seshachari, the claim is to recover the original debt, even then, the assignment being from the undivided son no certificate is necessary. In either view, the applicability of section 4 of the Succession Certificate Act does not arise, and the lower Appellate Court acted with material irregularity in the exercise of its jurisdiction. I must point out that this is a most irregular exercise of jurisdiction. The point was not raised by the appellant before the Sub-Judge. The question whether the promissory note was given for a family debt or the separate asset of the father would have to be determined before it can be ruled that a certificate is necessary. The further question whether, when by a fiction of law the claim relates back to the original debt, a certificate should be produced had to be determined. In the face of these difficulties and without giving the parties an opportunity of adducing evidence, the Sub-Judge reverses the decision given on the merits on a highly technical and by no means an undisputed legal point. I have no hesitation in saying that if ever a Court's corrective jurisdiction is to be called in aid to protect parties the present one is an eminently fit one for the exercise of that jurisdiction.

I agree in the order proposed.

Petition allowed.

(1) 28 Ind. Cas. 189; 2 L. W. 230.
(2) 11 M. 220; 12 Ind. Jur. 49.
(3) 18 Ind. Cas. 555; 24 M. L. J. 112; 13 M. L. T. 60.
(4) 18 Ind. Cas. 579; (1913) M. W. N. 101; 13 M. L. T. 123; 24 M. L. J. 205.

KRISHNA SAHAI *v.* PALAKDHARI RAUT.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1558 TO 1586 OF 1911.

January 28, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Walmsley.

KRISHNA SAHAI AND OTHERS—DEFENDANTS APPELLANTS

versus

PALAKDHARI RAUT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 38—Abatement of rent—Existing conditions—"Permanent," interpretation of—Deterioration—Land covered with sand, whether permanent deterioration.

A more liberal interpretation must be put on the word "permanent" in section 38 of the Bengal Tenancy Act and it must be construed with reference to existing conditions. [p. 236, col. 2.]

Thus where a land is covered with sand the deterioration is permanent with reference to existing conditions. [p. 236, col. 2.]

Gouri Pattra v. *Reily*, 20 C. 579at p. 586, followed.

Appeals against the decrees of the Subordinate Judge, third Court, Patna, dated the 23rd of December 1910, affirming those of the Munsif, second Court at that place, dated the 12th of September 1908.

Dr. *Rash Behary Ghose* and Babus *Lakhsmi Narain Singh* and *Chandra Sekhar Prosad Singh*, for the Appellants.

Babus *Umakali Mukherjee* and *Biraj Mohan Mazumdar*, for the Respondents.

JUDGMENT.

HOLMWOOD, J.—These second appeals raise the question, whether or not the respondents are entitled to abatement of rent under section 38 of the Bengal Tenancy Act on a finding by the Courts below that the respondents will have to pay rent as fixed by the Settlement for *karary* land, if the land re-appears or gets covered with earth. There were two descriptions of land in suit, and it is admitted that as far as the land that has been washed away is concerned, the abatement is permanent but it should have been made under section 52, and not under section 38. Still the fact remains that even this land, as the Subordinate Judge points out, may come back again. We are, therefore, met with the proposition that nothing in this world can be said to be permanent.

As regards the question of the sandy land, which is the point really argued before us, it is contended that there ought to be a remand for a proper finding whether the deterioration is permanent or not. But both the lower Courts have said, and in our opinion erroneously said, not as a point of fact but as a matter of interpretation of the section, that the deterioration is not permanent inasmuch as, they both say that, when the previous state of things is restored the rent will have to be restored also. To give effect to any such interpretation of the word 'permanent' would be to do away with the effect of section 38 altogether, and this was clearly pointed out in the case of *Gouri Pattra* v. *Reily* (1). The learned Judges, say: "We think the Judge is wrong: He seems to think that a deterioration ought not to be held to be permanent if by the application of capital and skill the cause of the deterioration might be removed. We are of opinion that a more liberal interpretation must be put on the word and it must be construed with reference to existing conditions." Now we think that this is a very sound legal proposition that the word 'permanent' in section 38 must in every case be construed with reference to existing conditions; and when a piece of land gets covered with sand, the deterioration is permanent with reference to existing conditions, for no human being can tell when it may please a Higher Power to cause the river to wash away the sand again or to deposit fresh earth upon it, and the case of an absolutely vague and uncertain event like this is even stronger than the example given in *Gouri Pattra's* case (1) of the application of human capital and skill. The more uncertain the result is, the more it must be held to come within the meaning of the word 'permanent' as construed with reference to existing conditions.

Both the Courts below have given the decree for abatement as asked for, and it is not necessary to vary the decree in any way merely because we consider that the passage in both the judgments stating what will be the rent in some future contingency, which has not arisen, must be expunged.

(1) 20 C. 579 at p. 586.

The result is that the appeals are dismissed. But as the point was one which could fairly be raised, each party will bear his own costs in this Court.

WALMSLEY, J.—I agree that the appeals should be dismissed.

Appeals dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 75 OF 1914.

March 19, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

MAHAMMAD HUSAIN SAIB AND ANOTHER 1 – DEFENDANTS—APPELLANTS

versus

ABDUL KAREEM SAIB— PLAINTIFF NO. 2 —RESPONDENTS.

Mortgage—Transfer of Property Act (IV of 1882), ss. 88, 89—Application for order absolute—Application in execution—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 182; 183—Civil Procedure Code (Act V of 1908), s. 48—Order absolute—Fresh starting point of limitation.

A preliminary decree in a mortgage suit passed under section 88 of the Transfer of Property Act is executable and in order to obtain an order absolute under section 89 steps have to be taken in execution; and Article 182 or 183 of the Limitation Act will apply to such applications if the decree happens to be passed by a Mofussil Court or by the original side of the High Court. [p. 238, col. 2.]

A decree-holder will have 12 years under section 48 of the Civil Procedure Code to perfect the preliminary decree and another 12 years under the same section if he gets an order absolute within the first 12 years. [p. 238, col. 2.]

Where a preliminary decree in a mortgage suit was passed on the 7th October 1901 and the first application to obtain an order absolute was made on 6th April 1904 and subsequent applications were made in 1907, 1910 and 1912 all within the three years of the immediately preceding application and all the applications were dismissed without granting the relief prayed for, and the present application was made on the 15th April 1912:

Held, that the application was not barred by limitation. [p. 239, col. 1.]

Malikarjunadu Setti v. *Lingamurti Pantulu*, 25 M. 244; 12 M. L. J. 279, *Rungiah Goundan & Co.* v. *Nanjappa Row*, 26 M. 780; 13 M. L. J. 412, *Haji Ashfaq Husain* v. *Lala Gauri Sahai*, 9 Ind. Cas. 975; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 33 A. 264; 4 Bur. L. T. 121; 21 M. L. J. 1140, *Epoor Ramasamy Reddy* v. *Kandadai Rangamannar Iyengar*, 23 Ind. Cas. 390; 15 M. L. T. 246; (1914) M. W. N. 622; 26 M. L. J. 255; *Abdul Majid* v. *Jawahir Lal*, 23 Ind. Cas. 649; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483; 36 A. 350, *Munna Lal Parruck* v. *Sarat Chunder Mukerji*, 27 Ind. Cas. 683; 17 M. L. T. 120; 2 L. W. 282; 19 C. W. N. 561; 21 C. L. J. 118; 17 Bom. L. R. 408, referred to.

Appeal against an order of the District Court of Salem, in Appeal Suit No. 118 of 1912, preferred against that of the District Munsif of Dharmapuri, in Original Petition No. 435 of 1912, in Original Suit No. 452 of 1901 on the file of the Court of the District Munsif of Krishnagiri.

Mr. *S. Doraisami Iyer*, for the Appellants.

Messrs. *M. O. Parthasarathy Iyengar* and *M. C. Krishnamachariar*, for the Respondent.

JUDGMENT.—This appeal raises an important question of limitation. A preliminary decree in a mortgage suit was passed on the 7th October 1901. On the 6th April 1904, the first application was presented to obtain the order absolute. This apparently was filed as an application for the execution of the preliminary decree. Subsequent applications were made in 1907, 1910 and 1912, all within three years of the immediately preceding application. Notices were sent in most of the applications. They were all dismissed without granting the relief prayed for. The present application is dated the 15th April 1912. It was objected to in the Court of first instance that as more than three years had elapsed from the date of the preliminary decree, the application was barred. The District Munsif held that there was no bar of limitation for such applications. On appeal, the District Judge held that the present application must be treated as one in execution of the decree and that Article 181 of the Limitation Act applied to it.

Mr. S. Doraiswami Iyer has cited before us a large number of authorities to show that the preliminary decree is not executable and that Article 180 applies to the application. There have been conflicting decisions regarding the executability of the preliminary decree. Different High Courts have taken different views. We wish to confine ourselves to a consideration of the decisions of this Court and of the Judicial Committee of the Privy Council.

In *Malikarjunadu Setti* v. *Lingamurti Pantulu* (1), the majority of the Full Bench came

(1) 25 M. 244; 12 M. L. J. 279.

to the conclusion that the preliminary decree in a mortgage suit was executable, and that the process for obtaining the order absolute was by way of execution. In arriving at this result the learned Judges were largely influenced by the language of sections 88 and 89 of the Transfer of Property Act. The first section speaks of the *preliminary decree* and the second section of applying for an *order* absolute. Even after the pronouncement in the Full Bench case, doubts arose regarding the applicability of Article 179 of the Limitation Act --(Act XV of 1877). As was pointed out by Mr. M. O. Parthasarathy Iyengar, the learned Counsel for the respondent, the import of the Full Bench ruling was explained in *Rungiah Goundan & Co.* v. *Nanjappa Row* (2). It was suggested in that case that ordinarily an application for an order absolute will be one to which Article 179 would apply. In certain cases Article 178 may also apply. This view was acted on in this Presidency for a long time until the decision of the Judicial Committee was reported in *Haji Ashfaq Husain* v. *Lal Gauri Sahai* (3). That decision, as we shall show presently, does not affect the conclusion stated in *Rungiah Goundan & Co.* v. *Nanjappa Row* (2). All that was laid down in *Haji Ashfaq Husain* v. *Gauri Sahai* (3), was that time began to run against the decree-holder after the passing of the final decree, that is, "from the date when it was made absolute." It did not say that the preliminary decree was not executable. But it was so understood in some of the cases decided in Madras. It is not necessary to refer to all the decisions. They are all mentioned in *Epoor Ramasamy Reddy* v. *Kandadai Rangamannar Iyengar* (4). In that case Sankaran Nair and Ayling, JJ., without expressing their opinion regarding the correctness of the decisions they quoted, held that the judgment-debtor was barred by *res judicata* from raising the plea that the preliminary decree was not executable. All these decisions were passed before the Judicial Committee's decision in *Abdul Majid* v. *Jawahir Lal* (5) was published. That case lays down distinctly that the Article applicable to an application for obtaining an order absolute is 179 of the Limitation Act.

This pronouncement must be taken to overrule the decisions of this High Court which held that the preliminary decree was not executable. Another decision of the Judicial Committee strengthens this view. In *Munna Lal Pairuck* v. *Sarat Chunder Mukerji* (6), their Lordships held that an application for an order absolute regarding a preliminary decree passed on the original side of the High Court was governed by Article 183 of the Limitation Act. Although the third column of that Article speaks of the "enforcement" of a judgment, decree or order, there can be no doubt that it is a provision for the execution of decrees passed on the original side, corresponding to Article 182 which deals with the Mofussil decrees. This view makes it clear that the process by which a preliminary decree is to be made the final decree is by way of execution.

The result of these decisions of the Judicial Committee may be thus summed up: (1) The preliminary decree passed under section 88 of the Transfer of Property Act is executable. (2) In order to obtain the order absolute under section 89, steps have to be taken in execution. (3) To such applications Article 182 or 183 will apply, as the decree happens to be for the Moffusil or for the original side of the High Court. (4) There is a fresh starting point given to the decree-holder after the preliminary decree ripens into a final decree. (5) It would follow from the above that a decree-holder will have 12 years under section 48 of the Code of Civil Procedure to perfect the preliminary decree, and another 12 years under the same section if he gets the order absolute within the first 12 years. This view is in consonance with the earlier Madras view in *Mallikarjunadu Seth* v. *Lingamurti Pantulu* (1) and in

(2) 26 M. 780; 13 M. L. J. 412.

(3) 9 Ind. Cas. 975; 33 A. 264; 15 C. W. N. 370 (P. C.); 8 A. L. J. 332; 9 M. L. T. 380; 13 C. L. J. 351; 13 Bom. L. R. 367; 4 Bur. L. T. 121; 21 M. L. J. 1140.

(4) 23 Ind. Cas. 390; 26 M. L. J. 255; 15 M. L. T. 246; (1914) M. W. N. 622.

(5) 23 Ind. Cas. 649; 36 A. 350; 12 A. L. J. 624; 16 Bom. L. R. 395; 18 C. W. N. 963; 19 C. L. J. 626; 27 M. L. J. 17; (1914) M. W. N. 485; 16 M. L. T. 44; 1 L. W. 483.

(6) 27 Ind. Cas. 683; 21 C. L. J. 118; 17 M. L. T. 120; 2 L. W. 282; 19 C. W. N. 561; 17 Bom. L. R. 408.

Rangiah Goundan & Co. v. *Nanjappa Row* (2).

All these difficulties are now avoided by the enactment of Order XXXIV in the Code of Civil Procedure.

For these reasons we hold that as the application for an order absolute was made within 12 years of the passing of the preliminary decree and as the decree has been kept alive by the steps taken under Article 179, this application is not barred by limitation.

We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL SUIT No. 237 OF 1908.
February 4, 1913.
Present:—Mr. Justice Bakewell.
SUIKEENA KATUM SAHIBA—PLAINTIFF
versus
Hajee MAHOMED ABDUL AZIZ
BADSHA SAHIB BAHADUR—DEFENDANT.

Civil Procedure Code (Act V of 1908), ss. 47, 73, O. XXI, r. 52—Decree obtained by fraud or collusion, question of, whether relates to execution of decree—Attachment, whether gives any priority—Rateable distribution.

The question whether a decree was obtained by fraud or collusion is not one which relates to the execution of the decree and can only be raised by a separate suit. [p. 239, col. 2; p. 240, col. 1.]

Sudindra v. *Budan*, 9 M. 80, followed.

Section 73 of the Civil Procedure Code applies where a judgment-creditor makes application in the prescribed form under Order XXI, rule 10, Civil Procedure Code, to the Court by which assets of the judgment-debtor are held, for the execution of his decree before the receipt of those assets by the Court. [p. 240, col. 1.]

An applicant for execution of his decree does not acquire any priority by virtue of his attachment and the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. [p. 241, col. 1.]

Mr. *S. Guruswami Chetti*, for the Plaintiff.

Mr. *A. E. Rencontre*, for the Defendant.

JUDGMENT.—Four applications have been made by four judgment-creditors of the plaintiff in this suit for payment to them of a fund to the credit of the suit, which was paid into Court by the defendant in satisfaction of the decree.

The dates of the decrees of the several creditors and of attachments of the fund are as follows:—

26th October 1911, attachment before judgment in Suit No. 315 of 1911;

15th October 1912, decree;

6th November 1912, decree in Suit No. 381 of 1912;

9th November 1912, attachment;

30th August 1912, decree in Suit No. 11931 of 1912 on the file of Court of Small Causes of Madras;

12th September 1912, attachment;

16th September 1912, decree in Suit No. 12787 of 1912 of the same Court;

27th September 1912, attachment.

It has been argued, *firstly*, that the applicants are entitled to adduce evidence that the decrees obtained by their rivals are fraudulent and void, and *secondly*, that their respective attachments are entitled to priority.

On the *first* point, two decisions *In re Sunder Das* (1) and *Chhaganlal* v. *Fazarali* (2) and an unreported judgment of Spencer, J., in *Narayanan* v. *Karuppan Chetty* (3) were cited. In the first case, the Calcutta High Court held that the lower Court rightly directed an inquiry whether the assignee of a decree held it *benami* for the judgment-debtor, and was, therefore, not entitled to share in the distribution of assets under section 295 of the Code of Civil Procedure, 1882. This is entirely different from an inquiry whether the decree itself is fraudulent and void as against creditors, but undoubtedly the learned Judges held that the Court was bound to see whether the claimants under that section were *bond fide* or merely *sham* decree-holders; and this ruling was followed by the Bombay High Court in the second case where the decree itself was alleged to be fraudulent.

It has, however, been already laid down by this Court in *Sudindra* v. *Budan* (4) that the question whether a decree was obtained by fraud or collusion, is not one which relates to

(1) 11 C. 42.
(2) 13 B. 154.
(3) C. R. P. No. 727 of 1910.
(4) 9 M. 80.

the execution of the decree and can only be raised by a separate suit; and this decision was not apparently referred to in the case before Spencer, J., who merely followed the cases already mentioned.

In the present case, this Court is not executing the two decrees of the Court of Small Causes, which have not been transferred to this Court for execution, and for this reason they do not fall within section 47 of the Code. None of the applicants is party to the suits in which the decrees which they impugn were passed, nor to the suit to the credit of which the fund in question stands; nor can any of them be said to be the representative of the judgment-debtor in these suits, unless an unsecured creditor can be said to be the representative of his debtor in any matter which may affect the ability of the latter to pay his debts.

I think it is clear that the question now sought to be raised does not fall within section 47, and that, if the applicants desire to set aside any of these decrees, they must institute proceedings for that purpose.

I have also come to the conclusion that section 73 of the Code, corresponding to section 295 of the Code of 1882, under which the cases cited were decided, does not apply to the present case; but I may point out that their Lordships of the Privy Council, in *Shankar Sarup* v. *Mejo Mal* (5), appear to regard an order under that section as an order of course, and the appropriate method of adjudication upon the rights of the parties to be a suit under sub-section (2).

It is also obvious that various difficulties of jurisdiction and otherwise might arise if the decrees of other Courts were allowed to be challenged in informal proceedings of this kind, in which those decrees cannot be actually set aside.

In order to take advantage of the provisions of section 73 of the Code, a judgment-creditor must have made application to the Court by which assets of the judgment-debtor are held for the execution of his decree, and under Order XXI, rule 10, such an application must be in the prescribed form. Secondly, the application must have been made before the receipt of those assets by the Court. Now it is clear that the holders of the decrees of the Court of Small Causes have not strictly complied with the first condition, because their applications are by Judge's summons for payment out of Court, nor has any of the applicants complied with the second condition, because the assets in question were received by the Court before any of them applied for execution. The employment in section 73 of the word "assets" instead of property of the debtor, and the references to the costs of realisation and to the sale of property subject to an incumbrance, appear to me to show that the section contemplates the case where property of a judgment-debtor has been realised in execution, and that it is not, therefore, applicable to the present case.

For these reasons, I think that the provisions applicable to this case are contained in Order XXI, rule 52, which deals with the attachment of a fund in the custody of a Court, and the determination of the rights of rival claimants thereto.

This procedure is analogous to the English practice, under which a charging order upon a fund in Court can be obtained by a judgment-creditor, together with a stop order restraining any dealing with the fund without notice to him (Rules of the Supreme Court, Order XLVI). By Statute, the creditor is then entitled to the same remedies as if a charge had been made in his favour by the judgment-debtor; and where there are several creditors, they will rank in the same manner as any other incumbrancers of a fund. (See Edwards on Execution, pages 345-46.)

Under the English Common Law, as modified by section 16 of the Statute of Frauds, a judgment-debtor's goods are bound from the time the writ of *fi fa* is delivered to the Sheriff; accordingly, the Sheriff is bound to give priority to each writ, and must apply the proceeds of the debtor's goods in the order in which the writs come to his hands. (See Edwards on Execution, pages 113—117.) This principle was followed in the Code of Civil Procedure, 1859, section 270, as regards the first attachment, but was modified with respect to any surplus by a provision for the rateable distribution thereof amongst other persons who had taken out

(5) 23 A. 313 at p. 322; 3 Bom. L. R. 713; 5 C. W. N. 649; 28 I. A. 203.

execution (section 271). That Code did not apply to the Supreme Courts, whose officer, the Sheriff, would doubtless be in the same position as an English Sheriff and administer the same law, though I am not aware of any direct authority on the point.

The previous law has now been replaced by the provisions of the Code of Civil Procedure, which applies to all Civil Courts, and it cannot now be contended that an attachment by an officer of Court confers any priority upon the attaching creditor. [Section 64 of the Code of 1908; *Fredcrick Peacock* v. *Madan Gopal* (6) and *Sankaralinga Reddi* v. *Kandasami Tevan* (7).] Much less can it be contended that an order of the Court under rule 52 confers any priority upon the person at whose instance the order was passed, since it amounts at most to an injunction restraining any dealing with the fund (See form No. 21, Appendix E, of the first Schedule of the Code) and merely renders any payment to the judgment-debtor, contrary to the attachment thereby effected, void as against all claims enforceable under the attachment, including claims for the rateable distribution of assets (section 64).

For these reasons, I am of opinion that none of the applicants has established any priority by virtue of his attachment, and that the fund in Court must be distributed on the principle followed by the Court in the administration of the assets of a deceased person or an insolvent, that is, rateably amongst the creditors who have put in claims thereto. [See *Soobul Chunder Law* v. *Russick Lal Mitter* (8).]

There remains a question as to the procedure to be followed with respect to the payment of the shares of the holders of decrees of the Courts of Small Causes, who have applied for payment to them directly. It is, I think, obvious that this cannot be done, because this Court cannot record satisfaction of those decrees, which may moreover be themselves attached or already satisfied. The case has been provided for by rule 180 of the Civil Rules of Practice, 1902, but not by the rules of this Court or the Court of Small Causes, and it is not clear what is the proper procedure. The shares of these creditors must, therefore, be carried to separate accounts entitled in the matter of their respective decrees, and be subject to the order of the Court of Small Causes of Madras.

The application of Hajee Muhammad Sait Shirajee is not correctly entitled, because it should have been made in Suit No. 237 of 1908, to the credit of which the fund stands; since, however, no objection has been raised, I direct the application to be amended by entitling it in that suit.

The shares of the judgment-debtors in Suits Nos. 315 of 1911 and 381 of 1912 will be paid to the credit of those suits.

The plaintiff in his suit is a Muhammadan woman, and several of the decrees against her appear to have been made by consent; having regard to these facts and the allegations made against each other by the several applicants, and in order to give them an opportunity of establishing those allegations in other proceedings, I direct that this order be not issued by the Registrar for ten days.

Each party will add the costs of his application to his decree amount.

(6) 20 C. 428; 6 C. W. N. 577.
(7) 30 M. 413; 17 M. L. J. 334; 2 M. L. T. 365.
(8) 15 C. 202 at p. 209.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 184 OF 1913.

March 24, 1915.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Tyabji.

Sri KAKARALAPUDI LAKSHMI NARAYANA JAGANADHA RAJU GARU AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Sri RAJAH KANDUKURI VEERA SARABHA VARAHA LAKSHMI NARA SIMMA VENKATA JOGI BALASURYA PRASADA RAO GARU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 6 (a)—Contract Act (IX of 1872), s. 23—Agreement to sell by reversioner of an estate when it devolves upon him—Specific performance, if enforceable—Contract, validity of.

A contract by an expectant reversionary heir to an estate to sell the same if and when it devolves upon him, is not specifically enforceable. The contract is prohibited by section 6 of the Transfer of Property Act and is also void under section 23 of the Contract Act. [p. 243, col. 2; p. 245, col. 1.]

Nasir-ul-Haq v. *Fyaz-ul-Rahman*, 9 Ind. Cas. 530; 33 A. 457; 8 A. L. J. 275, not followed.

Gitabai v. *Balaji Keshav*, 17 B. 232, distinguished.

Jones v. *Roe* (1789) 3 T. R. 88 at p 93; 100 E. R. 470; 1 R. R. 656, *In re Parsons, Stockley* v. *Parsons*

(1890) 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712, *Ram Chandra Tantra Das* v. *Dharmo Narayan Chuckerbutty*, 7 B. L. R. 341; 15 W. R. (F. B.) 17, *Wiseman* v. *Roper*, (1645) 1 Ch. Rep. 158; *Carleton* v. *Leighton*, (1805) 3 Mer. 667; 36 E. R. 255; *Harwood* v. *Tooke*, (1812) 2 Sim. 192; 29 R. R. 81; 57 E. R. 761; *Wethered* v. *Wethered*, (1828) 2 Sim. 183; 29 R. R. 77; 57 E. R. 757; *Lyde* v. *Mynn*, (1833) Myl. & K. 683; Coop. T. Brough. 123; 39 E. R. 839; 36 R. R. 415; *Ram Nirunjun Singh* v. *Prayag Singh*, 8 C. 138; 10 C. L. R. 66, *Sumsuddin* v. *Abdul Husein*, 31 B. 165; 8 Bom. L. R. 781, *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya*, 30 M. 201; 2 M. L. T. 184; *Sham Sundar Lal* v. *Achhan Kunwar*, 21 A. 71 at p. 80; 25 I. A. 183; 2 C. W. N. 729; *Nund Kishore Lal* v. *Kanee Ram Tewary*, 29 C. 355; 6 C. W. N. 395; *Manickam Pillai* v. *Ramalingam Pillai*, 29 M. 120; *Mohammad Hashmat Ali* v. *Kaniz Fatima*, 27 Ind. Cas. 701; 13 A. L. J. 110, referred to.

Appeal against the decree of the District Court of Ganjam at Berhampore, in Original Suit No. 19 of 1912.

Messrs. *S. Srinivasa Iyengar* and *P. Somasundaram*, for the Appellants.

Messrs. *P. Narayanamurthy* and *B. Somayya*, for Respondent No. 1.

Messrs. *N. Subba Rao* and *P. Gopalasami Iyengar*, for Respondent No. 2.

JUDGMENT.

WALLIS, C. J.—This is an appeal from the decree of the District Judge of Ganjam dismissing a suit brought by the plaintiff for specific performance of a contract entered into on the 11th May 1894 by the defendants and their father, who were at that time reversioners of the Urlam estate, by which they undertook to sell the estate to the plaintiff and to execute a proper sale-deed in his favour when the time came for putting him in possession. The learned District Judge, now Mr. Justice Kumaraswami Sastri, has dismissed the suit, on the ground that such a contract by reversioners is prohibited by section 6 of the Transfer of Property Act and is also void under section 23 of the Indian Contract Act as tending to defeat the provisions of law contained in the aforesaid section of the Transfer of Property Act. The question is undoubtedly one of great importance, and Mr. S. Srinivasa Iyengar has contended forcibly before us that contracts of this kind were enforceable both in England and in India before the Transfer of Property Act and that section 6 was not intended to affect them.

There can be no doubt that before the Act, in England and in India, a mere chance of succeeding to an estate was a bare possibility incapable of assignment: *Jones* v. *Roe* (1), *In re Parsons, Stockley* v. *Parsons* (2) and *Ram Chandra Tantra Das* v. *Dharmo Narayan Chuckerbutty* (3), where it was held that the interest of an heir under the Hindu Law expectant on the death of a widow in possession was not properly liable to attachment and sale in execution. It was nevertheless held in England that in the case of such expectancies equity would enforce a contract to convey the estate when it fell in. This was decided in the time of Charles I in *Wiseman* v. *Roper* (4) and notwithstanding certain observations of Lord Eldon in *Carleton* v. *Leighton* (5) and *Harwood* v. *Tooke* (6), was affirmed in *Wethered* v. *Wethered* (7) and *Lyde* v. *Mynn* (8) and has since been treated as settled law. Mr. Srinivasa Iyengar contends that the law in India was the same, and that the Transfer of Property Act has not made any difference and he refers to *Raja Saheb Perhlad Sein* v. *Baboo Budhoo Singh* (9), where their Lordships with reference to such an expectancy speak of "a contract to be performed in future and upon the happening of a certain contingency of which the purchaser may claim a specific performance, if he comes into Court showing he has done all he was bound to do." The other side refer to a passage in *Musammat Oodey Koowar* v. *Musammat Ladoo* (10), where their Lordships observed that a certain petition by which the petitioner renounced her claim to succeed on the death of a kinsman did not operate as a conveyance or a contract, *first*, because the petitioner had at the time no interest in the property and *secondly*, because the petitioner did not show that she was

(1) (1789) 3 T. R. 88 at p. 93; 100 E. R. 470; 1 R. R. 656.

(2) (1890) 45 Ch. D. 51; 59 L. J. Ch. 666; 62 L. T. 929; 38 W. R. 712.

(3) 7 B. L. R. 341; 15 W. R. (F. B.) 17.

(4) (1645) 1 Ch. Rep. 158.

(5) (1805) 3 Mer. 667; 36 E. R. 255.

(6) (1812) 2 Sim. 192; 29 R. R. 81; 57 E. R. 761.

(7) (1828) 2 Sim. 183; 29 R. R. 77; 57 E. R. 757.

(8) (1833) 1 Myl. & K. 683; Coop. T. Brough. 123; 39 E. R. 839; 36 R. R. 415.

(9) 2 B. L. R. 111 at p. 117; 12 W. R. (P. C.) 6; 12 M. I. A. 275; 2 Suth. P. C. J. 225; 2 Sar. P. C. J. 429; 20 E. R. 343.

(10) 13 M. I. A. 585 at p. 598; 15 W. R. (P. C.) 16; 6 B. L. R. 283; 2 Suth. P. C. J. 388; 2 Sar. P. C. J. 628; 20 E. R. 609.

contemplating any conveyance, but these observations did not amount to a direct ruling as to a contract to convey when the estate came into possession. It was apparetly with reference to this case that their Lordships observed in a passsage of an unreported judgment, cited in *Ram Nirunjun Singh* v. *Prayag Singh* (11), "that it went far to show that the principle of English Law, which allows a subsequently acquired interest to feed, as it is said, the estoppel, does not apply to Hindu conveyances." It was held by the Calcutta High Court in that case, following the English authorities, that a contract between expectant heirs to divide the estate, when it fell in, in a particular way was enforceable, and this was treated as well established by Sir Charles Sargent in *Gitabai* v. *Balaji Keshav* (12) at a time when the Transfer of Property Act had not been extended to Bombay. Lastly, in *Nasir-ul-Haq* v. *Fyaz-ul-Rahman* (13) the learned Judges were of opinion that such contracts were not affected by the provisions of section 6 citing the decision in *Ram Nirunjun Singh* v. *Prayag Singh* (11) which was before the passing of that Act, but the point was unneccessary for the decision.

It cannot be said that there is direct authority in India the other way, but the respondents rely on *Sumsuddin* v. *Abdul Husein* (14) and *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya* (15) as to the scope of section 6 of the Transfer of Property Act. That section provides that "property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force and that (*a*) the chance of a heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred." In the former case Jenkins, C.J., and Beaman, J., held a release by a Muhammadan woman of her expectancy of succeeding to a share of her father's estate was void as opposed to the provisions of the section and could not, as in England, be enforced in equity when the reversion fell into possession. In the later decision to which I was a party, it was held that a mortgage by an expectant heir of his chance of succession was void under section 6 and could not be enforced by virtue of section 43. This is in accordance with the observations of Lord Davey delivering the judgment of their Lordships in *Sham Sundar Lal* v. *Achhan Kunwar* (16) and with the observations of their Lordships in the judgment cited in *Ram Nirunjun Singh* v. *Prayag Singh* (11). It is, however, contended by Mr. Srinivasa Iyengar that these decisions do not affect the present point, and that in granting the specific performance the Court will not be giving effect to the equitable doctrine of feeding the estoppel, which he admits may be inapplicable, but merely enforcing a contract to do something in future which will not be illegal at the time it is done, *viz.*, to convey the estate after it has fallen into possession.

The other side rely on the ruling of Jenkins, C. J., that under section 6 (1) it was not intended to allow of the transfer of a mere chance of succession either at law or in equity, and if this be so, they contend that the learned District Judge was right in holding that the contract was void under section 23 of the Indian Contract Act, on the ground that, if permitted, it would defeat the provisions of section 6 (1) of the Transfer of Property Act.

On this question, looked at apart from authority, I should not entertain any doubt, as it seems futile to forbid such transfers of expectancies if contracts to transfer them are to be enforced as soon as the estate falls into possession. In these circumstances it seems to me that it is our duty to give effect to what we consider plain provisions of our statute law instead of following a course of English decisions, which would appear to have been based from the very first on a regard for long established practice rather than on principle and to have failed to commend themselves to Lord Eldon. For these reasons I think the District Judge was right and that the appeal must be dismissed with costs. Memorandum of objection is dismissed with the costs.

TYABJI, J.—The question in this appeal is whether specific performance may be granted

(11) 8 C. 138; 10 C. L. R. 66.
(12) 17 B. 232.
(13) 9 Ind. Cas. 530; 33 A. 457; 8 A. L. J. 275.
(14) 31 B. 165; 8 Bom. L. R. 781.
(15) 30 M. 201; 2 M. L. T. 184.
(16) 21 A. 71 at p. 80; 25 I. A. 183; 2 C. W. N. 729.

of an agreement, which has been entered into by an expectant reversioner, to transfer certain properties if and when the properties should devolve upon him as reversioner.

It was not seriously suggested that there was any rule of Hindu Law by which the rights of parties should be determined, to the exclusion of section 6 (*a*) of the Transfer of Property Act. Some cases that were relied upon by the appellant in reference to this point were decided before the Transfer of Property Act came into force, and, therefore, proceeded on the rule of English equity which enforces specific performance of such agreements: they do not enunciate any specific rule of Hindu Law which is to prevail unaffected by the Transfer of Property Act [section 2 (*d*) of the Act]. On the other hand in *Sham Sundar Lal* v. *Achhan Kunwar* (16), there is a dictum of the Privy Council to the contrary effect which seems to have been given effect to in *Nund Kishore Lal* v. *Kanee Ram Tewary* (17), *Manickam Pillai* v. *Ramalingam Pillai* (18) and *Sumsuddin* v. *Abdul Husein* (14).

It seems to me, therefore, that the appeal must be decided with reference to the Transfer of Property Act. The effect of section 5 and clause (*a*) of section 6, so far as material, is that an act by which a person purports to convey in present or in future the chance of an heir-apparent succeeding to an estate does not operate to transfer the chance. The argument of the appellant was two-fold, (1) that there is no attempt in the present case *to convey* any such chance, that what was done was an *agreement to convey* something in future and (2) that the subject of the agreement was the *property* and the rights after they were to become vested, not merely a chance of succeeding as an heir-apparent.

This argument does not seem to me to be sound. When property is conveyed in future, there is said to be a transfer of property no less than when it is conveyed in present (section 5 of the Transfer of Property Act), and the Legislature has provided that the chance of an heir-apparent cannot be the subject of conveyance in present or in future. An agreement, therefore, to convey in future such a chance cannot be considered a valid contract, because it is an agreement to transfer that which the law says is incapable of transfer. The "object" of such an agreement is of such a nature that, if permitted, it would defeat the provisions of section 6 (*a*) of the Transfer of Property Act (Indian Contract Act, section 23.)

Can it then be said that what was agreed to be transferred here was not such a chance but something else? The Transfer of Property Act does not permit a person having expectations of succeeding to an estate as an heir, to transfer the expectant benefits; when such a transfer is purported to be made, an attempt is in effect made by the two persons to change with each other their legal positions, an attempt by the one to clothe the other with what the Legislature refuses to recognise as rights but styles as a mere chance incapable of being transferred. It would be defeating the provisions of the Act to hold that though such hopes or expectations cannot be transferred in present or future, a person may bind himself to bring about the same results by giving to the agreement the form of a promise to transfer not the expectations, but the fruits of the expectations, by saying that what he has purported to do may be described in a different language from that which the Legislature has chosen to apply to it for the purpose of condemning it.

When the Legislature refers to the transaction as an attempt to transfer a chance, it indicates the true aspect in which it requires the transaction to be viewed. The alleged transferor never purports to transfer a chance *eo nomine*, but the Legislature by the terminology it has adopted has in effect laid down that until the expectant heir actually succeeds to the inheritance, he has no right but a mere chance of succeeding and that when he purports to deal with the subject of his expected inheritance, he in fact deals only with that chance, whatever be the name by which he chooses to designate it.

It seems to me to be unnecessary to deal with the English cases which have been cited to us, as we must guide ourselves by the provisions of the Acts of the Legislature. It was pointed out to us that *Sumsuddin* v. *Abdul Husein* (14) has been dissented from: see *Nasir-ul-Haq* v. *Fyaz-ul-Rahman* (13)

(17) 29 C. 355; 6 C. W. N. 395.
(18) 29 M. 120.

and *Mohammad HashmatAli* v. *Kaniz Fatima* (19) and inasmuch as *Sumsuddin's* case (14), purports to proceed on rules which must be applicable to Hindus as well as Mussalmans, it is argued that the decision is inconsistent with the well recognised principle that a Hindu reversioner may empower a widow to alienate property in which she has only a life-estate. That principle has, however, been supported on the ground that the reversioners' consent furnishes evidence of necessity or that the reversioners in effect release their claim, and the Allahabad Court seems to proceed on the basis that releases or relinquishments ought [contrary to the decision in *Sumsuddin's* case (14)] to be governed by a different rule from that applicable to transfers. On these points it is not necessary for me to express any opinion, as we have not to deal with a relinquishment.

I agree, therefore, that the agreement cannot be enforced and that the appeal should be dismissed with costs. The memorandum of objections is also dismissed with costs.

Appeal dismissed.

(19) 27 Ind. Cas. 70; 13 A. L. J. 110.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER NO. 88 OF 1914.

March 3, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ANANTA RAMAPPA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

SUBRAYA AND ANOTHER—PLAINTIFF—DEFENDANT NO. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXVI, r. 14 Partition decree—Execution—Division by casting lots, legality of—Equitable rule.

A casting of lots for the purpose of allotting shares to the parties in execution of partition decrees is not opposed to Order XXVI, rule 14. The most equitable way by which properties could be assigned to co-parceners is to draw lots after dividing the properties with reference to the number of sharers.

Narsing Narain Singh v. *Harkhu Singh*, 8 C. L. J. 521, followed.

Appeal against an order of the Court of the District Judge of South Canara, in Execution Appeal No. 7 of 1913, in Execution Petition No. 23 of 1913.

FACTS.—A Commissioner appointed to make partition cast lots for the purpose of allotting shares to the co-parceners. Objection having been taken to this procedure, the District Judge held that the procedure followed was quite proper. The defendants appealed.

Mr. *K. Yegnarayana Adiga*, for the Appellants:—The procedure adopted by casting lots is quite illegal. Order XXVI, rule 14, Civil Procedure Code, does not countenance such a thing. See also *Narsingh Narain Singh* v. *Harkhu Singh* (1).

Mr. *B. Sitarama Rau*, for the Respondents, was not called on.

JUDGMENT.—We see no reason to interfere with the order of the District Judge. We are not prepared to follow the decision in *Narsingh Narain Singh* v. *Harkhu Singh* (1), if it intends to lay down that the casting of lots for the purpose of allotting shares to the parties is opposed to Order XXVI, rule 14. We think the most equitable way by which properties could be assigned to co-parceners will be to draw lots after dividing the properties with reference to the number of sharers. That has been done in this case and we find no justification for holding that that procedure is unwarranted or illegal.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 8 C. L. J. 521.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION NO. 20 OF 1915.

April 17, 1915.

Present:—Mr. Justice Chamier.

Sheikh RAZA HUSAIN—DEFENDANT—APPELLANT

versus

Musammat HASAN JAN—PLAINTIFF—RESPONDENT.

Provincial Small Cause Courts Act IX of 1887), Sch. II, Art. 42—Suit for compensation—Jurisdiction.

M and *R* mortgaged a property belonging to *H* for their own proposes. The mortgagee obtained a decree. *H* paid off the decree to save his property

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and subsequently sued *R* alone to recover the money:

Held, that the suit was for compensation for an impudent wrong committed against *H* by *M* and *R* and was cognizable by a Small Cause Court. [p. 246, col. 2.]

Held, further, that *M* was not a necessary party to the suit, as each of the two executants of the mortgage was jointly and severally responsible to recompense the plaintiff. [p. 246, col. 2.]

Civil revision against the decree of the Small Cause Court Judge of Bareilly, dated the 18th of January 1915.

Mr. *Hamid Ullah*, for the Appellant.

Mr. *Haider*, for the Respondent.

JUDGMENT.—I admitted this application for revision, because it appeared to me that the suit was by one of several joint mortgagors of immoveable property for contribution in respect of money paid by her for the redemption of the mortgaged property and was, therefore, excluded from the cognizance of a Court of Small Causes, being a suit of the kind described in Article 42 of Schedule II of the Provincial Small Cause Courts Act. On examination of the record which has now arrived, I find that the suit is not of the description which I had supposed. It appears that one Muhammad Razi, who held a general power-of-attorney from the plaintiff, joined with the defendant Raza Husain in borrowing Rs. 300 from a man called Lalta Prasad. As security for payment of the money they purported to mortgage certain property belonging to the plaintiff. Muhammad Razi, without reference to the plaintiff took advantage of the power-of-attorney in his favour to mortgage his employer's property and he actually signed the deed on her behalf as her *mukhtar*. The plaintiff had no knowledge of the transaction until a suit was brought upon the mortgage. In that suit a decree for sale was obtained by Lalta Prasad and the plaintiff's property was proclaimed for sale. In order to save the property the plaintiff paid off the amount of the decree, and she then brought the present suit against Raza Husain saying that she intended to bring another suit against the heirs of Muhammad Razi.

Raza Husain objected that the suit could not proceed in the absence of Muhammad Razi's heirs. This objection was rightly thrown out. Raza Husain and Muhammad Razi, according to the evidence, conspired together to mortgage for their own purposes property belonging to the plaintiff. It is quite clear that they became jointly and severally responsible to recompense the plaintiff. They could have been sued together or either of them could have been sued alone. The property belonged to the plaintiff alone, and therefore, it is doubtful whether within the meaning of Article 42 the executants of the bond could be described as joint mortgagors of the property. But assuming this much in favour of the defendant, I have no hesitation in holding that the suit is not one for contribution at all. The plaintiff does not admit that she is liable for any portion of the money. It is in reality a suit by her for compensation for an impudent wrong committed against her by the defendant and another person and was, in my opinion cognizable by a Court of Small Causes. This application for revision by the defendant in this suit is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CITY CIVIL COURT APPEAL No. 17 OF 1913.

March 18, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

SREEKISAN PITTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

KOTA NAMALWARAYYA—PLAINTIFF—RESPONDENT.

Registration—Receipt containing agreement to accept rent-deed, whether compulsorily registrable.

A document which, besides being a receipt for money paid, contains an agreement to accept a rent-deed is an agreement to lease and is inadmissible in evidence without registration. [p. 247, col. 1.]

Appeal against the decree of the City Civil Court in Original Suit No. 190 of 1911.

Messrs. *T. R. Ramachandra Aiyar, C. Venkata Subbaramiah*, for the Appellants.

Messrs. *Venkatasubba Rao, Radhakrishnayya*, for the Respondent.

JUDGMENT.—We think that Exhibit B, besides being a receipt for the money paid by the defendants, is also a written record of

the plaintiff's agreement to accept a rent-deed, which was to be executed by the defendants and a record of the terms of the agreement to lease entered into between the plaintiff and the defendants. Exhibit A is referred to in Exhibit B as a document to be read with and as part of Exhibit B.

We think that having regard to the decisions in *Narayanan Chetty* v. *Muthiah Servai* (1) and in *Syed Ajam Sahib* v. *Meenatchi Devastanam* (2), Exhibit B must be treated as an agreement to lease and is inadmissible in evidence for want of registration. The decree of the lower Court will stand reversed and the suit will stand dismissed so far as it prays for specific performance.

Under the circumstances the parties will bear their own costs in both Courts.

Appeal allowed; Suit dismissed.

(1) 8 Ind. Cas. 520; 9 M. L. T. 142; 21 M. L. J. 44; 35 M. 63.

(2) 8 Ind. Cas. 668; 35 M. 95; 8 M. L. T. 437; (1910) M. W. N. 766; 21 M. L. J. 202.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 17 OF 1915.

April 19, 1915.

Present:—Justice Sir P. C. Banerji, KT.

TALAIMAND SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOBIND SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Small Cause Courts Act (*IX of* 1887), *Sch. II, Arts.* 41, 42—*Decree on mortgage—Payment by one co-mortgagor—Suit for contribution—Jurisdiction.*

A suit by one co-mortgagor against the other co-mortgagors for contribution in respect of money paid by him to discharge a decree obtained on their joint mortgage is not cognizable by a Small Cause Court. [p. 247, col. 2.]

Civil revision against an order of the Small Cause Court Judge of Azamgarh, dated the 3rd November 1914.

Mr. *Hamid-Ullah*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondents.

JUDGMENT.—This is an application for revision, and the only ground pressed is that the suit was not cognizable by the Court of Small Causes in which it was instituted, so that that Court had no jurisdiction to entertain the suit. In my opinion the plea raised is a valid one. There was a decree obtained against the parties to this suit upon a mortgage of 1891, which directed the mortgaged property to be sold. The plaintiffs' case was that this property belonged to both the parties and that as it was advertised for sale, they (the plaintiffs) had to discharge the amount of the decree in order to save the property from auction-sale; that they paid on account of defendants' share of the property a sum of Rs. 353-2-11 and that they were entitled to recover this sum from the defendants. The suit was to recover this sum of Rs. 353-2-11, and a further amount. The case is clearly one covered by Article 41 of Schedule II to the Provincial Small Cause Courts Act. It was a suit for contribution by a co-sharer in joint property in respect of a payment made by him of money due from a co-sharer. If the plaintiffs' allegation is true, they as co-shares had to pay money payable by the defendants who were their co-sharers in the property, and they claimed contribution in respect of the payment made by them. In any case it is a suit covered by Article 42, being in substance a suit by one of several joint mortgagors for contribution in respect of money paid by him for the redemption of the mortgaged property. The effect of the payment alleged to have been made by the plaintiffs was to redeem the property from the mortgage under which it was ordered to be sold. Therefore, the suit was one which was not cognizable by the Court of Small Causes and that Court had no jurisdiction to try it. It is true that it was the applicants themselves who instituted the suit in the Court of Small Causes, but that did not give the Court jurisdiction to try it. I accordingly direct that the case be sent back to the Court below with directions to return the plaint to the plaintiffs for presentation in the proper Court. As it was the plaintiffs themselves who brought the suit in the Court below, they must bear all the costs of the respondents including costs in this Court.

Case sent back.

ANDI MOOPAN *v.* MUTHUVIRAMA REDDY.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 115 OF 1914.

March 23, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Kumaraswami Sastri.

ANDI MOOPAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUTHUVIRAMA REDDY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Public highway, right of user of—Religious procession, carrying of—Civil right—Special damage, if necessary to maintain action—Injunction, grant of—Civil Procedure Code Act V of 1908, *O I, r.* 8—*Amendment.*

Every citizen has an inherent right to conduct religious processions through the public streets. This natural right may be restricted in the interests of public safety or its exercise may be limited. so that it may not infringe rights of property possessed by others, and the burden lies upon those who claim to impose fetters upon the exercise of such rights to establish the limitation. [p. 249 col 1]

Sundram Chetti v. *The Queen and Ponnusami Chetti* v. *The Queen*, 6 M. 203; 2 Weir 77; *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar*, 5 M. 304; *Sadagopachariar* v. *Ramo Rao*, 26 M. 376; *Sadagopachariar* v. *Krishnamoorthy Rao*, 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 204 (P. C.); 30 M 185; 30 I. A. 93; *Vijiaraghavachariar* v. *Emperor*, 36 M 554; 13 M. L. J. 171; *Kandasawmy Mudali* v. *Subraya Mudali*, 1 Ind. Cas. 716; 32 M 478; 19 M. L. J. 617, followed.

The right of every citizen to pass through public streets in procession is a civil right. [p. 249 col. 2.]

Vibudapriya Thirthaswami v. *Esoof Sahib*, 8 Ind. Cas. 175; (1910) M. W. N. 719; 9 M. L. T. 44; 35 M. 28; 20 M. L. J. 879, *Channu Dat Vyas* v. *Babu Nandan*, 6 Ind. Cas. 223; 7 A. L. J. 529; 32 A. 527; *Baslingappa* v. *Dharmappa*, 7 Ind. Cas. 663, 34 B. 571; 12 Bom. L. R. 586, followed.

Where the suit is by a headman to declare the right of his community to pass through public streets in procession and where that right is denied, he can maintain a suit without alleging special damage to himself. [p. 250, col. 1.]

Muthayya Reddi v. *Sudalaimuthu Nadar*, 5 Ind. Cas. 902; 20 M. L. J. 119; 8 M. L. T. 114; *Kandasawmy Mudali* v. *Subraya Mudali*, 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617; *Khaji Syyad Hussain Sahib* v. *Ediga Narasimhappa*, 16 Ind. Cas. 962; (1913) M. W. N. 991; 12 M. L. T. 491; 23 M. L. J. 539; *Kandasawmy Kovundan* v. *Karupanna Kovundan*, 21 Ind. Cas. 601; (1913) M. W. N. 1001; 14 M. L. T. 509, *Siddeswara* v. *Krishna*, 14 M. 177; 1 M. L. J. 321; *Abzul Miah* v. *Nasir Mahommed*, 22 C. 551, followed.

An original defect in the plaint can be cured by a subsequent order of amendment. [p. 250, col. 1.]

Srinivasa Chariar v. *Raghavachariar*, 23 M. 28; 7 M. L. J. 281; *Chennu Menon* v. *Krishnan*, 25 M. 399; *Fernandez* v *Rodrigues*, 21 B. 784; *Baldeo Bharthi* v. *Bir Gir*, 22 A. 269; A. W. N. (1900) 69; *Kalu Khabir* v. *Jan Meah*, 29 C. 100, followed.

Where an injury is of such a character that pecuniary compensation will not afford sufficient relief or where it is necessary to avoid multiplicity of judicial proceedings, an injunction will be granted. [p. 250, col. 2]

In cases where an actual offence is threatened, it is not necessary that recourse must be had to the Criminal Courts before seeking redress in the Civil Courts. [p. 250, col. 2.]

Ex parte Ball, In re Shepherd, (1879) 10 Ch. D. 667; 48 L. J. Bk. 57; 27 W. R. 563; 40 L. T. 141; 14 Cox. C. C. 237; *President of the Taluq Board, Kundapur* v. *Burde Lakshmi Narayana Kampthi*, 31 M. 54; 17 M. L. J. 537; 2 M. L. T. 461; *Attorney-General* v. *Sheffield Gas Consumers Company*, (1853) 43 E. R. 119 at p 125; 3 De G. M. & G. 304; 22 L. J. Ch. 811; 17 Jur. 617; 11 W. R. 245; 98 R. R. 151 and *Emperor of Austria* v. *Day*, 45 E. R. 861; 3 De G F. & J. 217; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. (N. S.) 639; 9 W. R. 712; 2 Giff. 628; 130 R. R. 101, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Trichnopoly, in Appeal Suit No. 64 of 1913, preferred against that of the Court of the District Munsif of Kulitalai, in Original Suit No. 540 of 1909.

Mr. *S. T. Srinivasagopalachariar*, for the Appellants.

Mr. *K. C. Gopaladesikachari*, for Mr. *S. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—The suit was originally filed by four persons, who styled themselves the headmen of the Pallar community, to establish their right to go in procession through certain public streets on some specified occasions. The Hindu inhabitants of the village to which the parties belong were arrayed as defendants. The defendants denied the right claimed by the plaintiffs. They had obtained an order from the Deputy Magistrate on the 20th July 1909 against the plaintiffs' passing in procession through the streets. The District Munsif, without taking any evidence, came to the conclusion that the defendants had no right, on the pleadings, to obstruct the plaintiffs, and relying on the decision in *Kandasawmy Mudali* v. *Subraya Mudali* (1) gave the plaintiffs the decree as prayed for. On appeal the learned District Judge drew attention to the fact that the suit was not instituted under Order I, rule 8, and that there was no allegation of any special injury having been sustained by the plaintiffs. He also referred to the fact that the averments of the plaintiffs were not definite regarding the road and the occasion during which the procession had to be

(1) 1 Ind. Cas. 716; 32 M. 478; 19 M. L. J. 617.

carried through. He, therefore, remanded the case for disposal to the District Munsif. After remand the plaintiffs obtained sanction under Order I, rule 8. They also filed an additional statement of their claim. The particulars of their right are set out in the revised judgment of the new District Munsif at page 21 of the printed papers. Broadly speaking, the claim of the plaintiffs is that they are entitled to proceed in procession from their hamlet along the public streets with music and tom-tom, (1) on the occasion of taking articles of worship to the Hindu temple, (2) on the occasion of receiving brides and bridegrooms during or after marriage, (3) on the occasion of taking presents to their masters' houses when any marriage or death took place and (4) on the occasion of proceeding to the Christian temple to drag the car.

The defendants denied all these rights and also stated that the rights claimed were not of a civil nature. The two main issues in the case were, (1) whether the reliefs claimed in the plaint are cognizable by a Civil Court and (2) whether the plaintiffs have established a custom for passing in procession, in the way alleged by them, through the public streets. On these issues the District Munsif came to the conclusion that the rights of the plaintiffs were made out, and gave them a declaration and injunction restraining the defendants from interfering with the exercise of the plaintiffs' rights. The Subordinate Judge, who heard the appeal, rested his judgment solely on the ground that the right claimed by the plaintiffs is not of a civil nature and dismissed the suit. This second appeal has been preferred against his judgment.

We are clearly of opinion that the suit is of a civil nature. Every citizen has an inherent right to conduct religious processions through the public streets. This natural right may be restricted in the interests of public safety; or its exercise may be limited so that it may not infringe the rights of property possessed by others. The burden will be upon those who claim to impose fetters upon the exercise of such rights to establish the limitation. The principles which have been guiding Courts in India in granting relief in such cases have been well laid down by Sir Charles Turner in the cases of *Sundram Chetti* v. *The Queen* and *Ponnusami Chetti* v. *The Queen* (2). See also the decision in *Parthasaradi Ayyangar* v. *Chinna Krishna Ayyangar* (3) and the decision in *Sadagopachariar* v. *Rama Rao* (4). The latter decision was affirmed in appeal by the Judicial Committee of the Privy Council in the case of *Sadgopachariar* v. *Krishnamoorthy Rao* (5). In the case *Vijiaraghavachariar* v. *Emperor* (6) Mr. Justice Bashyam Aiyangar inclined to the view that an assembly of persons passing a highway chanting prayers cannot be said to be lawfully engaged in the performance of a religious worship, unless it can be proved that the highway was dedicated subject to such a user. Mr. Justice Subramania Aiyar expressed a more decided opinion and said that the use of a highway for carrying processions is not its natural or legitimate user. In a later case *Kandasawmy Mudali* v. *Subraya Mudali* (1), Benson and Sankaran Nair, JJ., expressed doubts regarding the correctness of the position taken up by these learned Judges. Having regard to the decision of the Judicial Committee in the case *Sadagopachariar* v. *Krishnamoorthy Rao* (5) and to the long course of decisions on the question, we must hold that the right of every citizen to pass through public streets in procession is a civil right. The decision in *Vibudapriya Thirthaswamy* v. *Esoof Sahib* (7) supports this view. In the case *Channu Dat Vyas* v. *Babu Nandan* (8), the question did not relate to the right of procession. The Bombay High Court has accepted the view enunciated in *Sadagopachariar* v. *Rama Rao* (4). *Vide* the decision in *Baslingappa* v. *Dharmappa* (9). The Subordinate Judge is, therefore, wrong in dismissing the suit on that ground. As he has, however, expressed his concurrence with the findings of fact arrived at by the District Munsif, we shall proceed to deal with the arguments addressed to us in appeal in regard to them.

(2) 6 M. 203; 2 Weir 77.
(3) 5 M 304.
(4) 26 M. 376.
(5) 30 M 185; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. J. 566; 17 M. L. J. 240; 9 Bom. L. R. 663; 2 M. L. T. 264 (P. C); 30 I. A. 93.
(6) 26 M. 554; 13 M. L. J. 171.
(7) 8 Ind. Cas. 175; 35 M. 28; 20 M. L. J. 879; (1910) M. W. N. 79; 9 M. L. T. 44.
(8) 6 Ind. Cas. 223; 32 A. 527; 7 A. L. J. 529.
(9) 7 Ind. Cas. 663; 34 B. 571; 12 Bom. L. R. 586.

A subsidiary question was raised on behalf of the respondents that as the plaintiffs alleged no special damage, they had no cause of action to maintain the suit. In the original plaint the plaintiffs asked for a declaration, as headmen of their community, that they were entitled to march in procession through the public streets. The cause of action was the infraction of their individual rights. They also referred to the order passed by the Magistrate prohibiting them from going in procession. Under these circumstances, the plaintiffs were entitled to maintain the suit to vindicate the right denied to them. See the decision in *Muthayya Reddi* v. *Sudalaimuthu Nadar* (10) and the decision in *Kandasawmy Mudali* v. *Subraya Mudali* (1). In the case of *Khaji Syyad Hussain Sahib* v. *Ediga Narasimhappa* (11), the plaintiff alleged no special injury, butclaimed a right which was common to himand to the general public. The learned Judges held that such a suit was not maintainable The case *Kandaswamy Kovundan* v. *Karupanna Kovundan* (12) lays down a similar proposition. On the other hand, in the case *Siddeswara* v. *Krishna* (13) Mr. Justice Muthusami Aiyar points out that although a right litigated may be common to the plaintiff and to the other members of the public, there will be a right of action if the injury suffered is special to the plaintiff. The case *Abzul Miah* v. *Nasir Mahommed* (14) emphasises this principle. We are of opinion that the plaint, as originally framed, disclosed a cause of action which affected the plaintiffs injuriously and that it was not necessary to allege or prove any special damage.

Moreover, whatever may have been the defect in the original plaint, that has been cured by the permission obtained, after remand, to sue under Order I, rule 8. It is now settled law that a suit instituted without obtaining sanction under the said Order can be validated subsequently. See he decision in *Srinivasa Chariar* v. *Raghava Chariar* (15), the decision in *Chennu Menon* v. *Krishnan* (16), the decision in *Fernandez* v. *Rodrigues* (17), the decision in *Baldeo Bharthi* v. *Bir Gir* (18) and the decision in *Kalu Khabir* v. *Jan Meah* (19). The objection must be overruled.

It was also contended that as the substance of the grievance amounts to a criminal offence contemplated by the defendants, no civil suit will lie, and that the only remedy was by way of indictment. We see no force in the argument. Even in cases where an actual offence is threatened, it is not the law that recourse must be had to the Criminal Courts before seeking redress in the Civil Courts. See the decision in *Ex parte Ball, In re Shepherd* (20) and the decision in *President of the Taluq Board, Kundapur* v. *Burde Lakshmi Narayana Kampthi* (21). The decision in *Attorney-General* v. *Sheffield Gas Consumers Company* (22) and the decision in the *Emperor of Austria* v. *Day* (23) were cited to show that no injunction should be granted in such cases. We do not think that these cases have any application. Under the Specific Relief Act, where the injury is of such a character that pecuniary compensation will not afford sufficient relief, or where it is necessary to avoid multiplicity of judicial proceedings, an injunction will be granted. The present case is eminently a fit one for the grant of such a prayer.

We must reverse the decree of the lower Appellate Court and restore that of the District Munsif, with costs in this and in the lower Appellate Court.

Appeal allowed.

(10) 5 Ind. Cas. 902; 20 M. L. J. 119; 8 M. L. T. 114

(11) 16 Ind. Cas. 962; (1913) M. W. N. 991; 23 M L. J. 539; 12 M. L. T. 491.

(12) 21 Ind. Cas. 601; (1913) M. W. N. 1001; 14 M. L. T. 509.

(13) 14 M. 177; 1 M. L. J. 321.

('4) 22 C. 551.

(15) 23 M. 28; 7 M. L. J. 281.

(16) 25 M. 399.

(17) 21 B. 784.

(18) 22 A. 269; A. W. N. (1900) 69.

(19) 29 C. 100.

(20) (1879) 10 Ch. D. 667; 48 L. J. Bk. 57; 27 W. R. 563; 40 L. T. 141; 14 Cox. C. C. 237.

(21) 31 M. 54; 17 M. L. J. 537; 2 M. L. T. 461.

(22) (1853) 43 E. R. 119 at p. 3125; 3 De.G. M. & G. 304; 22 L. J. Ch. 811; 17 Jur. 677; 11 W. R. 245; 98 R. R. 151.

(23) 45 E. R. 861; 3 DeG. F. & J. 217; 30 L. J. Ch. 690; 4 L. T. 494; 7 Jur. (N. S.) 639; 9 W. R. 712; 2 Giff. 528; 130 R. R. 101.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2207 OF 1912.

March 10, 1915.

Present:—Mr. Justice Sharfuddin and Mr. Justice Coxe.

RAM CHANDRA MARWARI—DEFENDANT No. 1—APPELLANT

versus

GOPI NATH CHOWDHURI AND OTHERS—PLAINLTIFFS AND DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 10, 12—Property given to widow for maintenance with no right to transfer—Condition, whether valid—Life-estate, whether property—Maintenance, right of, transfer of.

A life-interest is just as much property as an absolute interest and any condition absolutely restraining the transferee from disposing of that property is void. [p. 251, cols. 1 & 2.]

Where the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance but that she should not be able to alienate it:

Held, that the restriction on the defendant No. 2's right to alienate the property was contrary to sections 10 and 12 of the Transfer of Property Act and, therefore, void. [p. 251, cols. 1 & 2.]

A right to maintenance cannot be transferred under section 6 (*d*), Transfer of Property Act, 1882, but specified property given in lieu of maintenance can be transferred. [p. 251, col. 2.]

Appeal against the decree of the District Judge, Mozafferpore, dated the 13th May 1912, affirming that of the Munsif, Muzafferpore, dated the 31st October 1911.

Babu *Shorashi Charan Mitra*, for the Appellant.

Babu *Gour Chandra Pal*, for the Respondents.

JUDGMENT.

COXE, J.—In this case the plaintiff and the defendant No. 2 came to an agreement in a former suit that certain property should be given to the latter for her maintenance, but that she should not be able to alienate it. She has alienated it to the defendant No. 1 and the plaintiffs accordingly have brought this suit to recover possession.

The suit has been decreed by the Courts below and the defendant No. 1 appeals. It is contended on his behalf that the restriction on the defendant No. 2's right to alienate the property is contrary to sections 10 and 12 of the Transfer of Property Act.

It appears to me that this contention must succeed. The property transferred to the defendant No. 2 appears to have been a life-interest. That, however, is just as much property as an absolute interest, and any condition absolutely restraining the transferee from disposing of that interest is, in my opinion, void.

The lower Court has relied on the case of *Kuldip Singh* v. *Khetrani Koer* (1). But though in that case there was a condition that the widow with the life-interest should not be empowered to execute any sort of document, yet the clause which was really considered by the learned Judge was a stipulation that transfers by either of the parties should not be valid unless consented to by both. It seems clear that this was the only clause that was considered. We sent for the original paper-book and find that this was the clause referred to in the judgment of the Court below. It is the only clause referred to in the head-note of the case and I may observe that it is in this light that the case is regarded in Mr. Gour's commentary on the Transfer of Property Act, section 379. A clause of that kind would certainly not amount, in my opinion, to an absolute restraint on the transferee from parting with the property; and as the decision in the case cited proceeded exclusively on that clause, it does not, in my opinion, bind us to hold that the restriction in the present case, which is of a very different nature, does not come within the scope of sections 10 and 12 of the Transfer of Property Act.

It has been contended that what was given to the defendant No. 2 was merely a right to maintenance and could not be transferred under section 6, clause (*d*), of that Act. But this clearly is not so. No doubt a right to maintenance cannot be transferred; but here specified property was given to the lady in lieu of her maintenance.

It is contended that sections 10 and 12 do not apply by reason of the provisions of section 2, clause (*d*). I do not think, however, that this can be regarded as coming within that section.

The transfer was certainly not a transfer by the operation of law or in execution of a decree. Was it then a transfer by a decree? The compromise was embodied in the decree. It has been laid before us, and it shows that the parties had settled their dispute and that the present plaintiff had agreed to give to the second defendant the

(1) 25 C. 869; 2 C. W. N. 463.

property in question. The plaint says that the defendant, second party, received the property under the said decree, or, to use the words of paragraph 5, "on the basis of the said decree." It can, therefore, I think, be rightly said that the decree itself transferred the property to the defendant No. 2.

In my opinion, the appeal succeeds and the suit must be dismissed with costs throughout.

SHARFUDDIN, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 68 OF 1914.

March 15, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

G. KOTHANDARAMIAH—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE GOVERNMENT OF MADRAS —DEFENDANT—RESPONDENT.

Civil Service Regulations, Arts. 458, 464, *interpretation of—Pension rules—Officer removed from Government service, whether entitled to pension under Article* 458.

Under Articles 458 and 464 of the Civil Service Regulations it is essential that an officer to be entitled to pension must be in the service on the date of his retirement. Therefore, an officer removed by Government from service before that date, can have no claim for any pension. [p. 253, col. 1.]

Appeal from the judgment of the Hon'ble Mr. Justice Bakewell, dated the 12th August 1914, in ordinary original civil jurisdiction, in Civil Suit No. 80 of 1914.

FACTS.—The plaintiff, while in Government service, was removed therefrom by the Government of Madras in 1901. Till 1913 he went on agitating the matter by way of appeal and not having had any redress, instituted the present suit for a declaration that he was entitled to a superannuation pension of Rs. 146-10-8 under Article 458 of the Civil Service Regulations and for other reliefs. Bakewell, J., who heard the suit, sitting on the original side, dismissed the same. The plaintiff appealed.

Messrs. *T. Rangachariar*, *K. Narain Row* and *C. Venkatasubbaramiah*, for the Appellant: — Article 458, read with Article 464, Civil Service Regulations entitles the appellant to the pension.

The Advocat-General and the Government Solicitor, for the Respondent, were not called on.

JUDGMENT.

SADASIVA AIYAR, J.—The plaintiff is the appellant before us. He brought the suit for a declaration that he was entitled to a pension of Rs. 146-10-8 per mensem, or such other sum as the Court may fix, from 1st August 1913 till his death; and for consequential reliefs. Paragraph 16 of the plaint says: "Plaintiff is thus eligible for pension under Articles 458 and 459 of the Civil Service Regulations from and after 1st August 1913, when plaintiff completed his age of 55 years." It was conceded in argument that Article 459 does not apply to the case, as the plaintiff was not "required" by the Local Government "to retire" when he attained the age of 55 on 1st August 1913. The other Article 458, which is relied on, is (omitting irrelevant portion), "a superannuation pension is granted to an officer in superior service entitled by rule to *retire* at a particular age." Mr. Rangachariar, who appears for the plaintiff, asked us to read this Article with Article 464, which says that "an officer in superior service, who has attained the age of 55 years, may, at his option, retire on a superannuation pension." Now, it is clear, (and if I understood Mr. Rangachariar aright, it was conceded by him) that *prima facie* these articles are applicable only if, when the officer attains the age of 55, *he was in service*, and, *while so in service*, exercised his option to retire from service. It is admitted in the plaint (paragraphs 8 and 9) that in 1901 the plaintiff was removed from Government service by the Government of Madras. Paragraph 18 also makes it clear that the plaintiff ceased to be in Government service in 1901, as he says in that paragraph that he was expecting all along to be reinstated in the Government service between 1901 and 1913 and was appealing to Government for restoration to service from time to time. I see nothing in any

of the other sections quoted to us by Mr. Rangachariar from the Regulations, which compels us not to give effect to the plain meaning and implication of the words of section 458, namely, that it is only an officer who is and has continued in Government service when and till he reached the age of 55, and who elects to retire at that age while so being in service, that is entiled to claim a pension under the Regulations. There being thus no basis at all in the Civil Service Regulations for the plaintiff's claim, the suit was rightly dismissed by the learned trial Judge and I would dismiss this appeal. The plaintiff must pay the defendant's costs.

NAPIER, J.—I entirely concur. The plaintiff claims a superannuation pension. The mere name for this class of pension is sufficient to put him out of Court, for it is clear that Article 458 of the Civil Service Regulations only applies to pensions granted to persons entitled or compelled to retire at a particular age. The plaintiff has neither been supperannuated nor did he retire. There is, therefore, obviously no foundation for this claim. I should like to add that we express no opinion as to whether this suit would lie, or whether these Regulations are conditions attached to the service binding on Government or whether this suit is maintainable without leave under the Pensions Act. All these points have not been dealt with by the trial Judge and we confine ourselves to the particular point on which the suit was dismissed.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 262 OF 1911.

April 2, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shah Din.

Musammat FAZLAN DEFENDANT—APPELLANT

versus

IMAM-UD-DIN—PLAINTIFF—RESPONDENT.

Deed, construction of—Dastbardarinama—*Widow relinquishing her life-estate for consideration—Sale or relinquishment—Consideration not passed—Deed, validity of.*

Where a widow executed and registered a deed styling it a *dastbardarinama*, and stated in it that she renounced all her rights as widow in the estate of her husband held by her in favour of the next male reversioner in consideration of his agreeing to pay her a certain amount which amount was never paid:

Held, that the deed was not a sale-deed but a deed of release by which the widow surrendered her life-estate in her husband's land. [p. 254, col. 2.]

Held, further, that since no part of the consideration for the surrender of her life-estate was paid to her by the reversioner the agreement embodied in the deed was void and unenforceable. [p. 254, col. 2.]

Second appeal from the decree of the Divisional Judge, Hoshiarpur Division, dated the 1st December 1910, affirming that of the Subordinate Judge, 2nd Class, Hoshiarpur, dated the 14th December 1909, decreeing claim on payment of Rs. 775.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Rai Bahadur *Pandit Sheo Narain*, for the Appellant.

Mr. *Fazl-i-Hussain*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a suit brought under the following circumstances. The defendant-appellant, *Musammat* Fazlan, who is the widow of one Nathe Khan, deceased brother of the plaintiff-respondent, Imam-ud-Din, was in possession in 1906 of one-half of the estate of her deceased husband, the other half being in possession of another widow, named *Musammat* Jainan, who has since died. On the 27th July 1906 *Musammat* Fazlan executed a deed on a stamp paper of eight annas in favour of Imam-ud-Din, by which she surrendered to him her life-estate in 110 *kanals* 17 *marlas* of land, which was in her possession as Nathe Khan's widow, in consideration of Rs. 775. The consideration money was made up of the two following items :

(*a*) Received at home ... ... Rs. 125

(*b*) To be received in cash before the Sub-Registrar ... Rs. 650

The parties appeared before the Sub-Registrar on the 27th July to have the deed registered, but the hour being late registration could not be effected and the parties were directed to appear again on the following day. Next day *Musammat* Fazlan appeared but Imam-ud-Din absented himself, and so the document was not registered and remained in the Sub-Registrar's office. Later, on the application

of Imam-ud-Din the document was compulsorily registered on the 20th October 1906. *Musammat* Fazlan then admitted that she had executed the document, but denied that she had received the consideration mentioned therein.

Meanwhile, on the 22nd December 1905 Imam-ud-Din had executed a lease of the land dealt with in the deed of the 27th July 1906 in favour of *Musammat* Fazlan: and on the strength of that lease *Musammat* Fazlan obtained a decree for rent against Imam-ud-Din on the 9th February 1909. Imam-ud-Din appealed from that decree, but his appeal was rejected by the Collector on the 28th April 1909. On the 22nd July 1909 the present suit was instituted by Imam-ud-Din against *Musammat* Fazlan for a declaration that the plaintiff was in possession of 110 *kanals* 17 *marlas* of land as proprietor thereof and that *Musammat* Fazlan had no rights whatever in the land. The suit was based on the registered deed, dated the 27th July 1906, above referred to. The defendant, *Musammat* Fazlan, pleaded, *inter alia*, that she did not execute the deed in question with her free consent and that no consideration whatever was paid to her.

The Subordinate Judge held that the defendant had executed the deed as a free agent, but that the consideration entered therein had not been received by her. He was of opinion that the deed was in the nature of a deed of sale and that non-payment of the consideration did not make it void or unenforceable. He accordingly decreed the plaintiff's claim, conditional on payment to the defendant by the plaintiff of Rs. 775 and delivery by him to her of a certain deed of relinquishment relating to a house. On appeal the learned Divisional Judge took the same view, namely, that although the consideration expressed in the deed had not been paid to the defendant, the deed which evidenced a transaction of sale was valid and could be enforced at the instance of the plaintiff. He accordingly dismissed the appeal.

Before us several points have been argued by the learned Counsel on both sides, but in the view which we take of the case it is unnecessary to discuss them here. The *first* question for decision is whether the deed, dated the 27th July 1906, is or is not a sale-deed; for if it is not a sale-deed, then the ground upon which the lower Courts have decreed the plaintiff's claim, namely, that he can enforce the deed as against the defendant although no part of the consideration expressed therein is proved to have passed to the defendant, is untenable. We have read the deed, which, as has been stated above, is written on a stamp paper of eight annas, and we have no doubt whatever that it is not a sale-deed, but a deed of release by which the defendant surrendered her life-estate in her half share of her husband's land (for *Musammat* Jainan, the other widow of Nathe Khan, was then alive) to the plaintiff, who was the next male reversionary heir of Nathe Khan, in consideration of his paying her Rs. 775. In the body of the deed it is nowhere stated that the deed was a deed of sale or that the defendant had sold her life-estate to the plaintiff for Rs. 775. If the transaction had been one of sale, the deed would have been written on a stamp paper of the value of Rs. 8, and not on a stamp paper of annas eight. Besides, in the concluding sentence the deed is called a *dastbardarinama*, which means a deed of release, and the executant states in the deed that she renounces all her rights as widow of Nathe Khan in the land held by her. This surrender of her life-estate by the widow to the next male reversionary heir was made by her in consideration of his agreeing to pay her Rs. 775, but this amount was never paid as agreed upon and the widow remained in possession of the estate, and in fact in 1905 obtained, as stated above, a decree for rent against the present plaintiff in respect of the land in suit. It is quite clear, then, that since no part of the consideration for the surrender of her estate was paid to the widow by the plaintiff, the agreement embodied in the deed of the 27th July 1906 was void and unenforceable, and the plaintiff acquired no rights whatever under that deed in the land in suit by virtue of the said deed. The deed not being a deed of sale, the doctrine that non-payment of consideration expressed in the deed did not prevent the proprietary rights in the land passing to the plaintiff, does not hold good in this case.

For the foregoing reasons, we accept this appeal and setting aside the decree of the

Divisional Judge, dismiss the plaintiff's suit with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1061 OF 1912.

April 10, 1913.

Present:—Mr. Justice Miller and Mr. Justice Sadasiva Aiyar.

NARASAPPAYYA—PLAINTIFF—APPELLANT

versus

S. GANAPATHY RAO AND ANOTHER—DEFENDANTS—RESPONDENTS.

Easement—User for less than prescriptive period, whether possession—Right of suit—Incorporeal right, nature of—Adverse possession—Inclosure, proof of—Strongest evidence.

Easements are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled. [p. 256, col. 1.]

Per *Sadasiva Aiyar, J.*—An incorporeal right which can be the subject of legal possession while in the process of acquisition should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct *animus* or intention of excluding other persons from like enjoyment with himself. [p. 259, col. 2.]

Inclosure is the strongest possible evidence of adverse possession. [p. 260, col. 1.]

Second appeal against the decree of the District Judge of South Canara, in Appeal No. 221 of 1910, preferred against that of the District Munsif of Mangalore, in Original Suit No. 335 of 1908.

Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Yagnyanarayana Adiga*, for the Respondents.

JUDGMENT.

MILLER, J.—The plaintiff prays for an injunction to prevent the defendants from cutting a channel from a tank, from which he waters some of his fields, so as to deprive him of the water. He alleged, *inter alia*, that the defendants were threatening to construct a dam to prevent the water from flowing to his fields, but this they denied.

The District Munsif, as I understand him, held that the plaintiff has a right to a supply of water from the pond in question to the exclusion of the defendants and on that ground issued the injunction prayed for. The District Judge holds that the plaintiff has no right to the water of the pond, though he had been in the habit of taking it through a channel for some time not exactly determined, but less than twenty years. He dismissed the suit.

In second appeal it is contended that on the finding of the District Judge we ought to hold that the plaintiff, though he has not by prescription acquired a right to take the tank water through his channel, is nevertheless entitled, having been for some time taking it in that way, to prevent the defendants, who have also no right to take the water, from taking it so as to deprive him of his supply, and in support of this contention reliance is placed on *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). It is perhaps unfortunate that in that case the learned Judges have referred to the right for which protection was there claimed as "in the nature of an incorporeal right in process of acquisition." It seemed to me during the argument before us that reliance was sometimes placed on this observation as suggesting the existence, in the eye of the law, of what I may call a partially acquired easement, as though the period required for the acquisition of an easement were a period of gestation, during which the easement gradually acquires form and life by a process of growth within the womb of prescription, and during which it is capable of suffering an injury.

It is perhaps hardly necessary to say that this is not the law. That is made clear by Farwell, J., in *Greenhalgh* v. *Brindley* (2). You have your easement or you have nothing. You have nothing more for 19 years' enjoyment than for 19 months, except possibly a greater prospect of success. What is growing and gradually ripening is not your easement, but your chance of success, and that is not a thing which the law protects. But I do not think that the learned Judges had in their minds anything in the nature of an inchoate or embryonic easement. Their decision was based on the view that in

(1) 6 Ind. Cas. 266; 20 M. L. J. 803; 34 M. 173 M. L. T. 352; (1910) M. W. N. 117.

(2) (1901) 2 Ch. 324; 70 L. J. Ch. 740; 84 L. T. 763; 49 W. R. 597; 17 T. L. R. 574.

many cases incorporeal rights are as much capable of possession as rights to corporeal hereditaments. This means that you may have an enjoyment of a thing incorporeal without title, an enjoyment which may properly be called possession and which will be protected in the same way that possession without title of corporeal things is protected. The question in each case will, therefore, be not whether the plaintiff has been enjoying the benefit which he seeks to retain, but whether he has possession of it.

In the opinion of Sir Frederick Pollock, no mean authority on questions of possession, easements "are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled. The only possession that can come in question is the possession of the dominant tenement itself"—Pollock on Torts, 8th Edition, page 375: and in Holmes' Common Law it is pointed out that "where an easement has been actually created, whether by deed or prescription, although it is undoubtedly true that any possessor of the dominant estate would be protected in its enjoyment, it has not been so protected in the past on the ground that the easement was in itself an object of possession but by the survival of precedents" founded, as he elsewhere explains, on ideas which permitted the acceptance of a theory that an easement is something belonging, attached, adhering, appurtenant, to the dominant estate itself and not to the owner thereof personally, and the learned author expresses the opinion that a person using a way for some years without an easement would not be protected in its use against third persons (Holmes' Common Law, pages 240, 241). The same illustration is repeated elsewhere in the same work, "a way, until it becomes a right of way, is just as little susceptible of being held by a possessory title as a contract" (page 354), and again "The Common Law does not recognize possession of a way; there must exist a right against the servient owner before there is a right against anybody else. At the same time it is clear that a way is no more capable of possession because somebody else has a right to it than if no one had" (page 382).

In the Roman Law the enjoyment of a servitude (or of certain servitudes) was considered to be a *quasi*-possession, *i. e.*, I take it, not a true possession, but something like it.

I do not wish to suggest that on its facts *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) was wrongly decided, but I am not sure that any question of possession of an incorporeal thing really arose there, and I must confess that I find it easier to accept generally Sir Frederick Pollock's view than the statement of the learned Judges in that case. I find difficulty in conceiving of any true possession of things incorporeal, though no doubt the enjoyment of some easements resembles in some ways the occupation and use of a corporeal thing, and it may be that there are cases in which the resemblance is so close as to warrant the extension to this *quasi*-possession of the protection which is given to true possession.

It is noticeable that Sir Frederick Pollock does not refer to *Jeffries* v. *Williams* (3) in the passage which I have extracted above, and that, I venture to think, is because he did not regard that case as bearing on the question; the actual decision turned on a question of pleading, and, though there are observations in the judgment which suggest that the protection of a possessoy right was in the minds of the learned Judges, still, as is pointed out in *Dhuman Khan* v. *Muhammad Khan* (4), the decision is based on the fact that the defendant was on the declaration to be taken to be a wrong-doer, as he had negligently injured the plaintiff's house and was not alleged to be the owner of the adjacent close or to have the owner's rights of mining and digging therein.

But, if the case is to be taken as a decision on a question of possessory right, it does not follow that other easements are similarly capable of possession. When I by building on my own land obtain the support for my house of my neighbour's land, it may perhaps be said without great inaccuracy that I have obtained something very like possession of the support. But can this be said of the plaintiff's claim in the present case?

(3) (1855) 5 Ex. 792; 20 L. J. Ex. 14.
(4) 19 A. 153; A. W. N. (1897) 22.

NARASAPPAYYA v. GANAPATHY RAO.

In *Stockport Waterworks Company* v. *Potter* (5), Bramwall, B., observed that the mere taking of water (from a river) by the plaintiffs did not give them a right of action; and referred to *Whaley* v. *Laing* (6) as deciding this point. In *Whaley* v. *Laing* (6), the plaintiff took water from a canal, by license of the owner of the canal, into a cistern of his own and thence to the engines which worked his mines. The defendant polluted the water of the canal and the foul water entered the plaintiff's cistern. Bramwell, B., delivered the judgment of the Court of Exchequer, holding that the plaintiff had a right of action but declining to decide whether he had any possessory right in the water; the ground of their decision was that the defendant without right caused foul water to flow on to the plaintiff's premises. The case was like *Jeffries* v. *Williams* (3), based on questions as to the sufficiency of the plaintiff's declaration and the defendant's pleas and in the Exchequer Chamber the judgment was reversed by a majority of the Judges, *Laing* v. *Whaley* (7). Willes, J., accepted the judgment of Bramwell, B., in the Court below and Crowder, J., held that the permission of the land-owner gave the plaintiff a rightful enjoyment of the water and the defendant had wrongfully polluted the stream. But Crompton, J., thought the plaintiff was bound to aver a right to the water and construed the declaration as averring such a right, but held on the facts that no right existed and refusing to construe the declaration, as the Court below had done, as one complaining of foul water thrown on the plaintiff's premises, was of opinion that the judgment ought to be reversed. Erle, J., agreed with him. Willams, J., held the declaration bad for want of any allegation that the plaintiffs were rightfully in enjoyment of the benefit of the water of the canal, and Wightman, J., stated the facts to be that neither the plaintiffs nor the defendants had any right to do that which they did and held that, on the facts as upon the pleadings, the judgment ought to be reversed. On the pleadings he found nothing in the declaration to show that the defendant by fouling the water had injured any right of the plaintiffs or could as against them be considered a wrong-doer, and that no right of action was shown. Martin, B., in the lower Court and Crompton, J., in the Exchequer Chamber put the case of the poisoning of a pond by a man without right and consequent injury to the cattle of a man watering them at that pond by permission of the owner. And Crompton, J., thought that in that case an action against the poisoner of the water might be founded in some circumstances, not on any right in the water, but on the wilful injury to the plaintiff's property. These cases are nearer the present case than the case of *Jeffries* v. *Williams* (3), and suggest that the enjoyment of the water of a river by taking it without right is not a possessory right which the Law of England will protect. Possession seems to involve an appropriation to the exclusion of others and with the intention of maintaining such exclusion, and it seems impossible to apply such a conception to the mere taking of water from a stream through a cut in the bank. There may be, no doubt, possession of the actual cut or channel, through which the water is taken, and possession of the water once it is appropriated, and that possession might be protected, and this seems from the record of the case reported in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) to have been the question there raised; the actual channel used exclusively by the plaintiff was obstructed by the defendant. *Acchamma* v. *Venkamma* (8) presents to my mind considerable difficulty, if it is to be regarded as a case in which the Court protected a possessory right. I find it difficult to conceive of the possession of the access of light to a house. But it may be that the learned Judges considered that the action would lie on account of injury to the plaintiff's property, as is suggested in *Dhuman Khan* v. *Muhammad Khan* (4) and by the observation of Crompton, J., in *Whaley* v. *Laing* (6), and that the

(5) (1864) 3 H. & C. 300 at p. 318; 10 Jur. (N. S.) 1005; 10 L. T. (N. S.) 748; 140 R. R. 453.

(6) (1857) 2 H. & N. 476; 26 L. J. Ex. 327; 29 L. T. (O. S.) 312; 5 W. R. 834; 115 R. R. 645.

(7) (1858) 3 H. & N. 675; 27 L. J. Ex. 422; 4 Jur. (N. S.) 960; 6 W. R. 750; 117 R. R. 918.

(8) 5 M. L. J. 24.

defendant would have to justify the *prima facie* nuisance by showing some right in himself. Possibly this is what they mean when they say that against a wrong-doer it was not necessary to show a prescriptive right. But even in this case we have the idea of exclusion which is essential to possession; the plaintiff's house alone was served by the light which was obstructed by the defendant's wall, and in this case, therefore, there may be some justification for protecting what may be regarded as a sort of possessory right.

In the present case, the plaintiff has no possession that I can see; he has not enclosed the pond; he has only cut a hole in one bank and that cannot give him possession of all the water in the pond; if I do not get possession of an unenclosed common by turning out my horse in one end of it to graze, I do not get possession of an unenclosed pond and its contents by making a cut in one end of it. The plaintiff has possession of the water when he gets it into his channel, but in no true sense has he possession of it before that. It is open to any one to go to the pond and draw water therefrom, and the defendant is not a wrong-doer as against the plaintiff; dishonesty apart, the case is parallel to one in which one man, being in the habit of stealing manure for his field from a farm yard, finds one day that another thief has been beforehand with him and taken the manure which he intended to steal. There could be no right of action in such a case.

The appeal must be dismissed with costs.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The facts found might shortly be stated thus. There is a small natural pond on Government land from which the plaintiff has been taking water to irrigate his lands, which are evidently on a lower level than the tank bed. It is not clear from the evidence for how many years past he has been so using that water, but the District Judge finds that he has not been doing it for any length of time, and that he has acquired no right as against the Government to use the water of the pond for *suggi* cultivation. The plaintiff purchased the land only eleven or twelve years before the suit. The defendants shortly before the suit dug a trench in another corner of the tank and tried to take the water of the tank to their own lands situated in the direction of the other corner. They also had no right as against the Government to do so. The plaintiff sued for an injunction against the taking of the pond-water into the defendants' fields. The District Judge dismissed the plaintiff's suit because the plaintiff possesses no legal right to take water from the plaint pond and the defendant by trying to take the water of the pond could not, therefore, infringe any legal right of the plaintiff. The contention of the learned Vakil for the plaintiff, Mr. Sitarama Rao, is that, because the plaintiff had been using the tank water for some years, though he had no right to do so, he was in possession of an incorporeal right to take such water and that the defendants as trespassers have no right to take such water and to interfere with the enjoyment by the plaintiff of such incorporeal right. Reliance has been placed on *Acchanna* v. *Venkamma* (8) and *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). Whether an incorporeal right of easement which is merely in process of acquisition can be held to be capable of legal possession at all till the process of acquisition is complete, is a very doubtful question. Pollock in his book on Torts at page 375 says as follows:—"Easements and other incorporeal rights in property, rather a fringe to property than property itself," as they have been ingeniously called, are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled: "a man who has used a way ten years without title cannot sue even a stranger for stopping it." In *Bonner* v. *Great Western Railway Company* (9), Baggallay, L. J., says, differing from Bacon, V. C., in the Court below: "I am unable to take the same view of the case as was taken by the Vice-Chancellor . . . In the present case the person complaining has no rights at all. It is admitted that the windows through which the plaintiff has derived light and air for a certain number

(9) (1883) 24 Ch. D. 1; 48 L. T. 619; 32 W. R. 190; 47 J. P. 580;

of years past, have not been enjoyed for a sufficient length of time to give him a right to that light. It appears that for sixteen years he has had the enjoyment of these windows, and the view taken by the Vice-Chancellor was apparently this, that he had an accruing right to the enjoyment of this light which, supposing there was no interruption on the part of the Railway Company, he might enjoy until the whole twenty years had expired, and that the defendants ought to be restrained from interfering with the acquisition of the easement by the plaintiff. But it seems to me to be contrary to every principle on which the Court acts in cases of this kind, that a person who has no right should obtain an injunction to restrain a Railway Company or *anybody else* from doing that which will interfere with his acquiring a right, by reason of his being unmolested for a certain length of time." Lindley, L. J., said in the same case: "The plaintiff comes here asking an injunction to restrain the defendants from interfering with certain lights which, he admits he has no title to. That appears to me to be the simple answer to the case, quite apart from anything else." Fry, L. J., concurred on the same ground, namely, "that the plaintiff has not enjoyed the lights, which are interfered with by that hoarding, for twenty years and he, therefore, has no *prima facie* title whatever to the access of light to that building." As regards the case in *Jeffries* v. *Williams* (3), as far as I could understand it, it was decided on the highly technical ground that the defendant's plea of "not guilty" did not properly raise the question of the plaintiff's title to lateral support from the adjacent sub-soil to his buildings and hence the defendant's plea must fail on that question. Anyhow I should be prepared on principle, if necessary, to differ from the dicta in *Acchanna* v. *Venkamma*(8) and *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1), to the effect that incorporeal rights in process of acquisition can be the subject of such legal possession as should be protected against the acts of another trespasser.

Assuming, however, that incorporeal rights in process of acquisition can be the subject of legal possession, what is the nature of the incorporeal right capable of such possession even while in process of acquisition? I am clear that the incorporeal right should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct *animus* or intention of excluding other persons from like enjoyment with himself. In *Acchanna* v. *Venkamma* (8), the plaintiff was enjoying access to light across a *poramboke* land to his windows. The right he was so enjoying was clearly enjoyed exclusively and the defendant, a trespasser, was interfering with plaintiff's said exclusive enjoyment by building a wall upon that *poramboke* land. In *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) also, I found on a perusal of the records that the plaintiff in that case had collected Government water flowing from certain hills into a channel and had been taking *the whole* of that water through that channel, which was under his control for about eighteen years, *into a tank belonging to him*. The defendant in that case put up a dam *in that channel which had been so under the plaintiff's exclusive control*, and diverted the water through a new channel which the defendant dug, branching from the channel under the plaintiff's control. The circumstances of that case, therefore, clearly indicated that the plaintiff had a clear intention to exclude others from using the water flowing through the channel which supplied the plaintiff's tank. In the present case, the facts proved do not establish any such intention on the plaintiff's part. He had nothing to do with the collection of the water which fell into the Government pond, and the mere fact that the Government Revenue Officers have not prevented the plaintiff from drawing the water (naturally stored in that pond) to irrigate the plaintiff's lands for a few years before suit, cannot raise any presumption that the plaintiff intended to exclude every other *ryot* from taking the water to their lands like the plaintiff, or even that the plaintiff when drawing the water began an enjoyment which he intended after sixty years (see Article 149 of the Limitation Act) to mature into a right against the Government to take such water against the wishes of the Government.

As I said above, even if a person could be said to be in legal possession of an incorporeal right *which he is merely in process of acquiring*, and even if it be held in consequence that he could sue others for infringement of that so-called possession, such a possession must at least be "exclusive" in the sense in which it is used by Lightwood in his book on Possession. He says at page 14, "Not only must the alleged possessor exercise the acts of ownership over the land, but other persons must be excluded. In English Law, however, the rule only requires that there should be no other person exercising acts of ownership or claiming possession adversely to the possessor. Two persons may jointly exercise acts of ownership, and they may thus gain a possession which vests in them an estate as joint tenants [*Ward* v. *Ward* (10); *cf.* Litt., S. 311], but in such a case there is really one possession, and the possessors enjoy together the rights which flow from it. It is different where there are two persons on land each claiming possession independently of the other, and then neither can acquire actual possession without excluding the other." (*cf.* Holmes' Common Law, 235, referring to *McGahey* v. *Moore* (1); *Barnstable* v. *Thacker*; Bigelow's Leading Cases on Torts, 353).

The question whether foreign interference is to be deemed to be in fact excluded is somewhat more difficult in the case of land than of goods. In the case of goods, as a rule, both the original act of appropriation and the existing custody are such as obviously to exclude others, but with land it is different. The possessor may be absent from the land, and other persons may be upon it. The practical rule appears to be that the area of the alleged possession must be marked out, and that there must be an habitual observance of its limits by the world at large (*cf.* Pollock and Wright on Possession, page 13). Ordinarily, as just stated, the area of possession is marked out by means of fences or other actual barriers which are themselves likely to keep away intruders. Inclosure is the strongest possible evidence of adverse possession [*Seddon* v. *Smith* (12)]. "If," said Bramwell, L. J., in *Coverdale* v. *Charlton* (13), "there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* posssession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common, he could not be said to have a *de facto* possession of the whole length of the common." If, as regards possession of a land itself, the difficulty of establishing exclusive possession is a serious one in many cases, the difficulty is *much* greater in the case of several incorporeal rights (like the right to irrigate the plaintiff's land from the water of a tank belonging to another) and the difficulty is still further increased in the case of an incorporeal right which is still in process of acquisition.

In the present case, the plaintiff's having taken for some years water stored in a Government pond cannot be held to constitute exclusive possession in the plaintiff of a right to take such water or a possession even intended to exclude others from doing a similar act, no more than the fact of a *ryot* having watered his cattle in the water of a Government pond for some years would, by itself, show a right or intention to exclude another *ryot* from watering his cattle also, when the latter subsequently finds it convenient to do so, though he had not done so before. In the result I would dismiss the second appeal with costs.

Appeal dismissed.

(10) (1871) 6 Ch. App. 789.
(11) 3 Ired. (N. C.) 35.
(12) (1877) 36 L. T. 168.
(13) (1878) 4 Q. B. D. 104 at p. 118; 48 L. J. Q. B. 128; 40 L. T. 88; 27 W. R. 257.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2679 OF 1912.

March 4, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

AKHIL CHANDRA SHAHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LTD., AND RIVERS STEAM NAVIGATION COMPANY, LTD.,—DEFENDANTS—RESPONDENTS.

Carriers Act (III of 1865)—Common carrier,

liability of, for loss of goods--Burden of proof—Negligence—Question of law or fact—Appeal, second.

A common carrier in India is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract. [p. 261, col. 2.]

Moothora Kant Shaw v. *India General Steam Navigation Company*, 10 C. 166; 13 C. L. R. 342; 8 Ind. Jur. 247; *Irrawaddy Flotilla Co.* v. *Bhuwan Das*, 18 C. 620(P.C.); 18 I. A. 121 and *British and Foreign Marine Insurance Company* v. *India General Navigation and Railway Co.* 9 Ind. Cas. 364; 38 C. 28; 15 C. W. N. 226, followed.

The burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence. [p. 261, col. 2].

Choutmull Doogar v. *River Steam Navigation Co.*, 24 C. 786, 1 C.W.N. 201 affirmed on appeal to the Judicial Committee in the *River Steam Navigation Co.* v. *Choutmull Doogar*, 26 C. 398; 26 I. A. 1; 3 C. W. N. 145, *Sesham Patter* v. *Moss*, 17 M. 445 and *India General Steam Navigation Co.* v. *Bhagwan Chandra Pal*, 19 Ind. Cas. 245; 40 C. 716; 17 C. W. N. 632; 17 C. L. J. 939, referred to.

In order to find whether the question of negligence is a question of law or fact, the rule is that from any given state of facts the Judge must say whether negligence can legitimately be inferred and the Jury, whether it ought to be inferred. In other words, if the contention is that there is no evidence of negligence, the question is one of law; on the other hand, the question, whether the evidence is sufficient to justify the inference of negligence is one of fact. [p. 262, col. 2.]

Metropolitan Railway Co. v. *Jackson*, (1877) 3 A. C. 193 at p. 200; 47 L. J. C. P. 303; 37 L T. 679; 26 W. R. 175, followed

Central Cachar Tea Co. v. *River Steam Navigation Co.*, 24 C. 787 at p. 791*n*, referred to and followed.

Appeal against the decree of the District Judge, Backergunj, dated the 19th of July 1912, reversing that of the Munsif, first Court, Barisal, dated the 22nd of December 1911.

Babus *Jogendra Chandra Ghose* and *Satis Chandra Ghose*, for the Appellants.

Babus *Mohendra Nath Roy* and *Mohini Mohan Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for damages. On the 7th April 1910, the plaintiffs made over to the defendants, who are common carriers, sixty bags of sugar for carriage from Calcutta to Jhalakati. The goods were received in the ordinary course of business and were placed on a flotilla for conveyance to the place of destination. On the 12th April, between 2-30 and 3 in the morning the flat, which carried the goods, struck a snag; the vessel thus sprang a leak and the sugar in the bags was spoiled by the water. The plaintiffs accordingly claim as damages the price of the sugar. The defendants plead non-liability by virtue of the condition printed on the back of the forwarding note. The Munsif decreed the suit, but on appeal the District Judge has dismissed it. On behalf of the plaintiffs the decision of the District Judge has been assailed as erroneous in law, and reference has been made to the provisions of the Indian Carriers Act, 1865, and to judicial decisions thereon.

Two principles applicable to cases of this description must now be accepted as firmly settled. The *first* principle is that a common carrier in this country is liable as an insurer, that is, he is responsible for the safety of the goods entrusted to him, in all events, except when loss or injury arises from act of God or King's enemies. But his liability for loss or injury in respect of the goods carried may be varied by contract. This is clear from the decision of a Full Bench of this Court in *Moothora Kant Shaw* v. *India General Steam Navigation Company* (1), as also from the decision of the Judicial Committee in *Irrawaddy Flotilla Company* v. *Bhuwan Das* (2) and a recent decision of this Court in *British and Foreign Marine Insurance Company* v. *India General Navigation and Railway Company* (3). The *second* principle is that the burden of proof of absence of negligence is upon the common carrier, on the theory that the loss or damage to the goods is *prima facie* proof of negligence. On this point it is sufficient to refer to the cases of *Choutmull Doogar* v. *River Steam Navigation Company* (4), affirmed on appeal to the Judicial Committee in the *River Steam Navigation Company* v. *Choutmull Doogar* (5), *Sesham Patter* v. *Moss* (6) and *India General Steam Navigation Company* v. *Bhagwan Chandra Pal* (7).

(1) 10 C. 166; 13 C. L. R. 342; 8 Ind. Jur. 247.
(2) 18 C. 620 (P. C.); 18 I. A. 121.
(3) 9 Ind. Cas. 364; 38 C. 28; 15 C. W. N. 226.
(4) 24 C. 786; 1 C. W. N. 201.
(5) 26 C. 398: 26 I. A. 1; 3 C. W. N. 145.
(6) 17 M. 445.
(7) 19 Ind. Cas. 245; 40 C. 716; 17 C. W. N. 632; 17 C. L. J. 639.

Now, the fifth clause of the conditions printed on the back of the forwarding note in the present case is in these terms:—"The Company will not be liable for the loss or damage to any property delivered to be carried, caused by the act of God, stress of weather, difficulties and casualties of navigation, or any accident of the rivers or navigation, or any other loss or damage of whatever nature or kind soever, unless such loss or damage shall have arisen from the negligence or criminal act of their servants or agents." The burden of proof is upon the defendants, carriers, to establish that the loss did not arise from negligence on their part. This point of view was apparently not fully appreciated by the District Judge, when he stated that in his opinion there was not sufficient evidence from which he could reasonably infer such negligence on the part of the servants of the defendants as would entitle the plaintiffs to damages. No question of burden of proof, however, really arises in this case, for as, was pointed out in the case of *Central Cachar Tea Company* v. *River Steam Navigation Company* (8), where evidence has been given on both sides of the circumstances under which the loss took place, and the Court has arrived at a finding upon the whole of such evidence, the question of burden of proof ceases to have any practical importance. Consequently, the ultimate point for consideration in the present case is whether the defendants have established absence of negligence on their part. This question requires consideration from two points of view, *viz.*, in the *first* place, was the injury to the flat due to negligence of the servants of the carriers, and *secondly*, after the collision had taken place, was there any negligence on their part in their attempt to save the goods? As regards the *first* branch of this question, the District Judge has found that there was no evidence to show that the snag was visible at the time of the night the flotilla passed, and he has drawn the inference that the accident was not attributable to careless navigation. As regards the *second* branch, he has found that as soon as the collision had taken place, the *serangs* went into the port hole and found the water waist deep there. They at once got to work with the pumps and reduced the accumulation of water. This was clearly their first duty, and by the time this was done, a good deal of damage would necessarily have been caused to the sugar. Reference, however, has been made to the circumstance that the bags of sugar had been placed alongside some bags of soda and that the water which had passed through the soda did greater damage to the sugar than might otherwise have happened. But we are unable to hold that this was an act of negligence on the part of the carriers; they were under no obligation to keep the bags of different articles in distinct compartments in anticipation of a possible accident. The conclusion follows that the finding of the District Judge that there was no negligence on the part of the carriers, does not involve any error of law.

It has been finally argued that the question whether there was or was not negligence on the part of the carriers under given circumstances, is always a question of law which can be determined by this Court in second appeal. We are unable to accept this contention as well founded on principle. The rule applicable to cases of this description was enunciated by Lord Cairn in the case of *Metropolitan Railway Company* v. *Jackson* (9) in these terms: "It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the Judge must say whether negligence *can* legitimately be inferred and the Jury, whether it *ought* to be inferred." In other words, if the contention is that there is no evidence of negligence, the question is one of law for the Judge to decide; on the other hand, the question, whether the evidence is sufficient to justify the inference of negligence, is one of fact. The present case is clearly of the latter description.

The result is that the decree of the District Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(8) 24 C. 787 at p. 791*n*.

(9) (1877) 3 A. C. 193 at p. 200; 47 L. J. C. P. 303; 37 L. T. 679; 36 W. R. 175.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 49 OF 1914.

April 6, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ALLAHABAD TRADING AND BANKING CORPORATION, LTD.—PETITIONER—APPELLANT

versus

GHULAM MUHAMMAD AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

Provincial Insolvency Act (*III of* 1907), *s.* 31—*Secured creditor, meaning of—Agreement appointing creditor sole agent for sale of debtor's goods—Sale-proceeds to be paid to creditor.*

Where an agreement was entered into between a debtor and his creditor whereby the latter was appointed the sole agent for the sale of all books already published or thereafter to be published by the debtor with a condition that the sale-proceeds, after deducting the commission, was to be credited towards the discharge of the debt:

Held, that the creditor was entitled to be regarded as a secured creditor. [p. 264, col. 2.]

Secured creditor means a person holding a mortgage, charge, or lien upon property of the debtor or any part thereof as security for the debt due to him from the debtor. [p. 264, col. 1.]

First appeal from an order of the District Judge, Allahabad, dated the 11th March 1914.

Dr. *Satish Chandra Banerjee* (with him Mr. *Sarat Chandra Chaudhuri*), for the Appellant.

Mr. *Harendra Krishna Mukerji* (with him Messrs. *S. J. Shapoorjee*, *Girdhari Lal Agarwala*, *Ladli Prasad Zutshi* and *Uma Shankar Bajpai*), for the Respondents.

JUDGMENT.—The only question for decision in this appeal is whether the appellant, the Allahabad Trading and Banking Corporation, Limited, is entitled to be regarded as a secured creditor of the respondent, Ghulam Muhammad, who has been declared an insolvent. The appellant Bank rests its claim to be regarded as a secured creditor (1) upon an agreement, dated October the 18th 1910, (2) upon section 171 of the Indian Contract Act, and (3) upon section 221 of the same Act. The learned District Judge has held that all three grounds are untenable. As regards the *second* and *third* grounds we may content ourselves with saying that we agree with the Court below that neither section 171 nor section 221 of the Contract Act gives the appellant any lien on the property in question. The *first* ground requires careful examination. The agreement above mentioned was entered into between Ghulam Muhammad and his wife, *Musammat* Shahzadi, on the one hand and the appellant Bank on the other. It begins by appointing the Bank sole agent for the sale of all books already published or to be published thereafter by the City Press and Messrs. G. A. Asghar and Co. It appears that Ghulam Muhammad and his wife were owners of the City Press and carried on business also under the name of Messrs. G. A. Asghar & Co. The appointment of the Bank as the sole agent of Ghulam Muhammad and his wife for the sale of the books is declared to be subject to several terms or conditions. The first condition is, shortly, that all books then in stock and all books to be published thereafter are to be made over at once to the appellant Bank and the liability of the Bank in respect of the books made over to them is specified. The second condition is that a commission of eight per cent. will be allowed to the Bank on the net value of all books sold by it, except school and college books on which a commission of ten per cent. will be allowed. The third condition is that the sale proceeds of the books realized by the Bank shall be placed to the credit of Ghulam Muhammad's and *Musammat* Shahzadi's joint loan account every month after deducting the commission due to the Bank. The fourth clause deals with discounts. The fifth with the giving of credit to purchasers. The sixth with the question of advertising books for sale. The seventh clause provides that the agreement shall continue as long as Ghulam Muhammad and *Musammat* Shahzadi remain owners of the City Press and the firm of Messrs. G. A. Asghar & Co., and as long as the appellant Bank continues. The eighth condition (so called) is an undertaking by one Ram Charan Shukul, on behalf of the appellant Bank, to act as the sole agent of the City Press and of Asghar & Co., on the terms and conditions set out in the agreement. The appellant Bank relies principally upon the third clause of the agreement, namely, that which provides that the sale proceeds shall be credited to the joint loan account of Gulam Muhammad and *Musammat* Shahzadi. On behalf of the general body of creditors, it is contended that the agreement of October the 18th 1910 evidences no more than a contract of agency, and it is argued that the parties cannot have intended to make the books security for any particular loan, seeing

that it is expressly provided that the agreement is to last so long as the two businesses owned by Ghulam Muhammad and his wife exist, and so long as the appellant Bank continues to do business; it is said that if the intention had been to make the books security for the benefit of the appellant Bank, some express provisions would have been made regarding proceeds of sale after the loan was paid off. Stress is also laid on the fact that the agreement does not in express terms confer either a lien or a charge on the Bank.

The learned District Judge says that the claim of the Bank based upon the agreement of October the 18th, 1910, is obviously untenable, for the agreement does not provide that books shall be regarded as security for the debt or that the creditors shall have a lien on them, and that the third clause, on which the Bank relies so much, prescribes merely the way in which the sale proceeds shall be applied. On behalf of the Bank it is contended that the agreement should be construed as a whole, and that the test is whether the parties to the agreement intended that the Bank should, under it, have special facilities for recovering the advances which it had made. The expression "secured creditor" is not defined in the Provincial Insolvency Act. For the purposes of this case both sides are content to accept the definition contained in the English Bankruptcy Act, according to which *secured creditor* means a person holding a mortgage, charge, or lien upon the property of any debtor or any part thereof as security for the debt due to him from the debtor. The word security is not defined in the Indian Act or in the English Act. On behalf of the Bank it is contended that the word means and includes anything that makes payment of the money more secure or the money more readily recoverable. There can be no doubt that the agreement was intended to give the appellant Bank the exclusive right to sell all the books published by the debtor and his wife and to appropriate the whole of the proceeds, after payment of the commission, towards the discharge of the joint loan account. According to the agreement the Bank had a right not only to retain, when handed over, the books of the debtor and his wife and sell them, as provided in the agreement, but a right to call upon the debtor and his wife to deliver all books, as they were published, for the purpose of being sold by the Bank. It seems to us impossible to avoid the conclusion that the intention was to confer a security upon the Bank. A question might arise as to whether the general body of creditors would not be entitled to any surplus proceeds available after discharge of the Bank's claim. We are informed, however, that there is no prospect of there being any balance after the discharge of the Bank's claim and that we need not consider the question any further. We hold that the agreement was intended to give the appellant Bank a lien or charge on the books and that, therefore, the Bank is entitled to be regarded as a secured creditor. We allow this appeal and set aside the order of the District Judge. Costs of this appeal and of the proceedings in the Court below will be paid out of the estate. In the circumstances this means that the appellant Bank will be entitled to add its costs to the amount due to it under the agreement.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 271 OF 1914

April 26, 1915.

Present:—Justice Sir P. C. Banerji, KT.

PADARATH TEWARI—PLAINTIFF—APPELLANT

versus

BAZ SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Possession by tenant of parti *land for tying cattle and other agricultural purposes—Presumption—Adverse possession, question of, if arises.*

Where a tenant is in possession of a *parti* land at a short distance from the site of his house for the purposes of keeping his cattle troughs, cattle-shed and sugar-cane press, the presumption is that the land was given to him for purposes ancillary to agriculture, and if he builds a house on the land for the stalling of cattle and storing of the implements of husbandry, the *zemindar* cannot get the house demolished so long as he remains a tenant. [p. 265, col. 1.]

No question of adverse possession arises in such a case. [p. 265, col. 1.]

Second appeal from the decision of the District Judge of Benares, dated the 12th November 1913.

Mr. *Harnandan Prosad*, for the Appellant.

Mr. *Harendra Krishna Mukerjee*, for the Respondents.

JUDGMENT.—The plaintiff, who is one of the co-sharers in the village, brought the

suit out of which this appeal has arisen for demolition of certain constructions made by the defendants on *parti* land. The defendants contended that they had been in possession of this land for a long time, that they had their cattle troughs, sugar-pressing mill and a shed for storing sugarcane juice and keeping cattle on the land and that they had rebuilt the shed which they had there. The Court of first instance found in favour of the defendants and dismissed the suit, and this decree has been affirmed by the lower Appellate Court. In my judgment on the findings of both the Courts below, the decision of the lower Appellate Court is right. It has been found that the house of the defendants, who are tenants in the village, is at a short distance from the site in dispute, that they have been in possession of this site for upwards of 12 years and have had their cattle troughs, cattle shed and sugarcane press there, and that all that they have now done is to build a house for the stalling of cattle and storing of the implements of husbandry. The learned Judge from all these circumstances drew the inference that the land had been given to the defendants as a part of their holding, and that they were entitled to occupy the land so long as their holding existed. In my opinion the inference which the learned Judge drew from the facts is a reasonable inference. Where a tenant has been in possession of a piece of land for purposes ancillary to the purposes of his agricultural holding, the fair presumption is that the land was given to him for the purposes last mentioned. There was no question of adverse possession in this case. Under the circumstances found, the plaintiff was not entitled to eject the defendants from the land in suit and his suit was rightly dismissed. I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 758 OF 1914.

January 22, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Tyabji.

K. GURUSWAMY NAIDU—DEFENDANT—APPELLANT

versus

K. SUBBA NAIDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLIII, r. 1 (u)—Order of remand under Madras Estates Land Act (I of 1908), whether appealable.

No appeal lies against an order of remand made in proceedings under the Madras Estates Land Act I of 1908.

Appeal against the decree of the District Court of Chengleput, in Appeal Suit No. 314 of 1913, preferred against that of the Court of the Sub-Collector of Chengleput, in Original Suit No. 20 of 1912.

Mr. *N. Viswanadha Aiyar*, for the Appellant.

Mr. *T. Ethiraja Mudaliar*, for the Respondents.

JUDGMENT.—This appeal can only be brought under Order XLIII, rule 1, (*u*) corresponding to section 588 (28) of the old Code of Civil Procedure, which is part of Chapter XLIII, and does not apply to proceedings under the Madras Estates Land Act (*vide* section 192). The appeal does not lie and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 2028 OF 1914.

March 5, 1915.

Present:—Mr. Justice Rattigan and Mr. Justice Shadi Lal.

DR. TARA CHAND JERAM DAS—RESPONDENT—APPELLANT

versus

THE OFFICIAL LIQUIDATORS OF THE PEOPLE'S BANK OF INDIA, LTD., LAHORE, IN LIQUIDATION—APPLICANTS—RESPONDENTS.

Limitation—Appeal filed with delay—Sufficient cause—Objection by respondent at hearing—Companies Act (VI of 1882), s. 169—Appeal—Notice to respondent—Limitation period, expiring during vacation—Extension of limitation period—Right of Official Liquidator to recover by summary process from creditor of Bank who realised his debt by suit before passing of winding-up order and after suspension of payment by Bank—Companies Act (VII of 1913), s. 284.

The period of three weeks prescribed by section 169 of the Companies Act may be extended by Appellate Court, when it is satisfied that the appellant showed due diligence but failed on account of circumstances beyond his control, such as the Court being closed on account of the vacations. [p. 267, col. 1.]

No extension can be claimed on the ground that

the Pleader for the appellant wrongly believed that section 284 of the Companies' Act, 1913, was applicable to the case, for the section clearly lays down that Act of 1882 applied to cases in which proceedings were pending when the Act of 1913 came into force. [p. 267, col. 2.]

A respondent is entitled to contest an *ex parte* order extending the period of three weeks prescribed by section 169 of the Companies Act, 1882. [p. 266, col. 2.]

An Official Liquidator is not entitled by summary order to a refund of money realized by a creditor of the Bank before the order of winding-up was passed but after the Bank had passed a resolution stopping payment of debts. The Liquidator has to file a regular suit like other claimants to recover the amount realized by such creditor of the Bank. [p. 268, col. 2; p. 269, col. 1]

Miscellaneous first appeal from an order of the District Judge, Lahore, dated the 21st August 1914, directing appellant to refund Rs. 1,546-3-7.

Lala *Bhagwan Das*, for the Appellant.

Mr. *Herbert* and Lala *Madan Gopal*, for the Respondents.

JUDGMENT.—The People's Bank of India, Limited, is being woundup by the Court at Lahore and in the course of the winding-up proceedings, and upon the application of the Official Liquidators, the District Judge issued notices to certain persons to refund to the Official Liquidators sums of money respectively realised by them in execution of decrees obtained in suits against the Bank instituted after the said Bank had suspended payment. Several of these persons appeared before the District Judge in person or by Counsel and on various grounds contested their liability to make such refunds; and eventually, by order dated 21st August 1914, the District Judge found (except as regards certain specified persons who were exempted from liability) that the sums realized by the contesting respondents were invalid under section 213 of the Indian Companies Act, 1882, as against the Official Liquidators. The learned Judge accordingly directed (1) the said respondents to refund to the Official Liquidators such sums as they had respectively realised in execution of their decrees, and (2) "the Official Liquidators to take action under the Act to recover such amount."

Before proceeding, we may here explain that the People's Bank of India, Limited, a very extensive financial concern with branches in various parts of India and Burma, suspended payment on the 19th September 1913. The news of this fact soon spread and within a day or two a number of creditors and depositors instituted suits against the Bank to recover their money, and many of them succeeded in obtaining decrees and realising their moneys before an order was passed by the Court for the winding-up of the insolvent Bank. As a matter of fact, an application in this behalf was made to the District Judge, Lahore, on the 21st October 1913 and on the 17th November 1913 the Court. accepted the application and directed the Bank to be woundup under the orders of the Court. Under the provisions of section 133 of the Act the winding-up must, therefore, be deemed to have commenced on the 21st October 1913, when the petition for the winding-up was presented. Several of the persons affected by the order of the District Judge, dated 21st August 1914, filed appeals, under section 169 of the Act, to this Court and this judgment will dispose of all these appeals.

At the hearing before us a preliminary objection was raised on behalf of the Official Liquidators that notice of the appeals was not given to them within three weeks of the date of the District Judge's order, and that as there was no reasonable excuse for this delay, the appeals must be held to be barred by section 169. As a matter of fact the period was extended in each case by orders of this Court but as those orders were passed *ex parte*, the Official Liquidators are entitled to ask us to decide whether such extensions of time were rightly granted, and if we hold that they were not, to reject the appeals on that ground. In this connection we were referred to a ruling of this Court reported as *Sultan Singh* v. *Badhawa Singh* (1), where it was laid down that an extension of time should not be allowed unless the appellant can show that he himself has been duly diligent and that any delay that has occurred has been due either to the respondent's conduct or to some action or inaction on the part of the Court. We have no hesitation in accepting this principle, and what we have here to decide is whether

(1) 22 Ind. Cas. 795; 68 P. R. 1914; 100 P. L. R. 1914.

the particular appeals before us fall within the spirit of the authority cited.

At the time when the District Judge passed his order, the Chief Court was in vacation and was closed for ordinary civil work, and we consider that that fact afforded sufficient justification for appellants to wait until the Court re-opened after the vacation, and that the test to be applied is to see whether after the re-opening of the Court, they exhibited such diligence as would justify the Court in granting them an extension of time.

Now, in all but two cases, the appeals were actually filed in this Court before the close of the vacation and prompt steps were taken immediately after the vacation to ensure service of notice on the Official Liquidators without unnecessary delay, with the result that in all cases (except the two above referred to) notices were actually given to the latter within three weeks from the date when the Court re-opened for civil work. In these circumstances, we are of opinion that extension of time was rightly granted to those appellants and that consequently Miscellaneous Civil Appeals Nos. 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037 and 2130 are within time. Mr. Parker's argument that in any event an extension of time cannot be granted after the expiration of the period limited by section 169, has no force in view of the high authorities to the contrary [see *Banner* v. *Johnstone* (2), *Manchester Economic Building Society, In re*(3)]. On the other hand, Miscellaneous Civil Appeals Nos. 2317 and 2318 were admittedly not filed till the 5th October 1914, and process fees for issue of the notices were not paid till the 5th January 1915. The only explanation for this delay that the learned Pleader for those appellants (Mr. Moti Lal) can give is that his clients would not reply to his letters and that he himself was under the impression that the provisions of the Indian Companies Act, 1913, applied to the appeals. The *first* ground obviously can afford no sufficient excuse, and as to the *second*, section 284 of the Act of 1913 is so clear in its terms that we cannot understand how any one could have supposed that the appeals were to be governed by its provisions, and not by those of Act VI of 1882. We must accordingly hold that these two appeals are barred by section 169 of Act VI of 1882 and dismiss them, as we hereby do. But as, for reasons to be given, we hold that the District Judge had no jurisdiction to pass the order now under appeal, we leave the parties in those appeals to bear their own costs. Civil Appeal No. 2129 of 1914 was apparently filed under a misapprehension, as the appellant, Murli Dhar, was expressly excepted from the operation of the District Judge's order. As he is not present either in person or by Pleader or agent, his appeal is dismissed in default.

Reverting now to the appeals which we hold to be within time, we find it unnecessary in the view we take to discuss the question whether the District Judge was or was not right in finding that the payments by the Bank to the appellants in execution of their decrees were invalid under section 213 of the Act as against the Official Liquidators. In our opinion the proceedings before the District Judge, from the date when the Official Liquidators applied to him to take action to recover such amounts up to and including his order of the 21st August 1914, were wholly without jurisdiction, inasmuch as there is no provision in Act VI of 1882 which enables the Court directing the winding-up to recover or authorise the recovery of moneys in the hands of persons, other than those expressly mentioned in section 149, by summary process.

In support of the District Judge's order we have been referred to sections 152, 165 and 166 of the Act, but we can find nothing in any of these sections which gives jurisdiction to recover such moneys by summary process. Section 152 merely provides that in cases where the Court directs certain persons to pay money, it may, instead of directing the money to be paid to the Official Liquidator, direct that such money shall be paid into the Banks therein specified. In other words, it is in the nature of a supplement to section 149 and does not *per se* enlarge the jurisdiction of the Court as to the persons to whom such orders may be given [see Sir W. Page Wood, L. J., *In re United English and Scottish Life Assurance Company, Ex parte*

(2) 40 L. J. Ch. 730; 5 H. L. 157; 24 L. T. 542.
(3) 53 L. J. Ch. 115; 24 Ch. D. 488; 49 L.T. 793; 32 W. R. 325.

Hawkins (4)]. Now sections 149 and 152 of the Indain Companies Act, 1882, correspond (for all practical purposes) with sections 100 and 103 of the English Companies Act, 1862, and it has been authoritatively settled by the Courts in England that section 100 of the English Act is applicable only to the persons therein specifically mentioned and must not be extended to include other persons (Buckley's Companies Act, 5th Edition, page 166). Mr. Herbert for the Official Liquidators argued that a creditor of the Bank who had by means of undue or fraudulent preference obtained payment of his debt must be regarded as "a trustee," in respect of money so obtained, for the Bank and its other creditors as represented by the Official Liquidators. But the case of *In re United English and Scottish Company, Ex parte Hawkins* (4), above cited, is direct authority to the contrary. In this case, Selwyn, L. J, remarked: "I. think *Hollingsworth's* case (5) and *Cox's* case (6) are conclusive authorities that a constructive trust of this kind is not within the 100th section of the Companies Act, 1862." So too in the case of the *Marlborough Club. In re* (7), Romily, M. R., refused to place on the list of contributories persons who had fully paid up their shares and observed, "I cannot put them on solely to give the Court jurisdiction to enforce payment of the debts due from them. The Liquidator must recover these debts in the County Court in those cases where the debts are small, and where they are large he must bring actions in the usual way. The rule is the same in bankruptcy proceedings. If a payment or other disposition of property, otherwise valid, be made in circumstances that amount to a fraudulent preference, the payment at the time it is made is a good payment and so remains unless and until it is set aside as a fraudulent preference. The creditor is, therefore, not a trustee for the trustee in bankruptcy, and the proper order to make is for repayment, but if he do not repay he cannot be committed to prison under the Debtor's Act, 1869, the remedy must be enforced in the ordinary way." (Halsbury's Laws of England, Volume 2, section 474 citing *Ex parte Hooson* (8)].

Sections 165 and 166 of Act VI of 1882 in no way help the contentions of the Official Liquidator. The former section deals with the case of contributories and debtors to the Company, and a creditor of the Company who has, whether lawfully or by undue or by fraudulent preference, obtained payment of his money from the Company, cannot by any strech of language be described as either a contributory or as a debtor of the Company. The latter section merely provides that "orders made by a Court under this Act may be enforced in the same manner in which decrees of such Court made in any suit pending therein may be enforced." Clearly this provision relates to such orders only as are made with jurisdiction, and does not cover orders passed *ultra vires.*

It was contended that unless the Official Liquidator could, by summary process, recover from those persons money alleged to have been paid to them by way of undue or fraudulent preference, he would be put to the grave inconvenience of having to institute innumerable suits in various districts in order to recover such moneys. We are not insensible of this difficulty and inconvenience, but as usual there are two sides to this question and the person from whom recovery is sought may justly urge that as he is not in any way connected with the Company except in so far as he happened to be one of its creditors, it is manifestly unjust that he should be made to refund money to the Company, unless and until the question whether he obtained payment of it by means of undue or fraudulent preference has been decided in the ordinary way by regular suit, and not by summary inquiry.

For the reasons given and upon the authorities above referred to, we hold that the District Judge had no jurisdiction under Act VI of 1882 to direct the refund of the moneys obtained by the appellants in execution of their decrees or to autho-

(4) 3 Ch. App. 787 at p. 790; 19 L. T. 232; 16 W. R. 1136.

(5) 3 De G. &. Sm. 102; 64 E. R. 399; 84 R. B. 303.

(6) 3 De G. & Sm. 180; 19 L. J. Ch. 167; 14 Jur. 387 64 E. R. 435.

(7) 5 Eq. 365; 37 L. J. Ch. 296; 18 L. T. 46; 16 W. R. 668

(8) 8 Ch. App. 231; 8 L. T. 4; 21 W. R. 152; 42 L. J. Bk. 19.

rise the Official Liquidators to take action to recover the said money under that Act. The only course open to the Official Liquidators is to institute suits in the regular way and when they do so they can, of course, rely upon the provisions of section 213 and adduce evidence in support of their contentions. The question, whether the payments made to the creditors of the Bank under the circumstances set forth in the District Judge's orders are invalid under the provisions of section 213 of Act VI of 1882, is one which can be determined only by the Court trying such suits, and the District Judge, as the Court directing the winding-up of the Company, had no jurisdiction to express an opinion thereon.

We accordingly accept the appeals above mentioned as being within time and set aside the order of the District Judge dated 21st August 1914. The Company must pay all costs both here and in the Court below.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 384 OF 1913.

March 8, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

KALAVAGUNTA SINGARA CHARLU AND OTHERS—DEFENDANTS NOS. 1, 5 AND 6—APPELLANTS

versus

SREEMAN GUDIMALLA VENKATA SESHAMMA—PLAINTIFF—RESPONDENT.

Hindu Law—Gift by Hindu widow to her husband's niece after consummation of latter's marriage, whether valid—Improvements, bona fide, *by donee—Compensation.*

A Hindu widow has no right to make a gift, even of a reasonable portion of her husband's property, to a lady born in her husband's family after the consummation of that lady's marriage. [p. 270, col. 1.]

Where the donee or her representatives effect, during the period they are in possession, *bona fide* improvements on the property they are entitled to claim compensation for the same and a decree in ejectment should not be passed until the value of such improvements is paid to them. [p. 270, col. 1.]

Ramasami Ayyar v. *Vengidusami Ayyar*, 22 M. 113, *Anavilla Sundararamayya* v. *Cherla Sitamma*, 10 Ind. Cas. 56; 9 M L. T. 469; (1911) 1 M. W. N. 422; 21 M. L. J. 695; 35 M. 628, *Pugalia Vettor Ammal* v. *Vettor Goundan*, 13 Ind. Cas. 475; (1912) M. W. N. 89; 11 M. L. T. 103; 22 M. L. J. 321, distinguished.

Second appeal against the decree of the Court of the District Judge of Kistna at Masulipatam, in Appeal Suit No. 275 of 1912, preferred against that of the Court of the Principal District Munsif of Tamuku in Original Suit No. 508 of 1910.

Mr. *P. Narayanamurti*, for the Appellants.

Messrs *P. R. Ganapathi Aiyar* and *R. Rangaswami Aiyangar*, for the Respondents.

This second appeal coming on for hearing on the 8th of September 1914, the Court delivered the following

JUDGMENT.—In *Ramasami Ayyar* v. *Vengidusami Ayyar* (1), a sonless widow was held entitled to make a gift to her daughter's husband of a reasonable proportion of the estate (which the widow had inherited as qualified owner) *on the occasion of the daughter's marriage*, because such a gift of land "is believed to enhance the merit of the primary act *viz.*, the giving of a virgin in marriage," and "a qualified owner" (like a Hindu widow who has inherited her husband's or son's estate) has the power "to do all acts proper and incidental to the marriage of a female" of the family to which her husband belonged. In *Anavilla Sundararamayya* v. *Cherla Sitamma* (2), a Hindu father was held entitled to make a gift of a fair proportion of his lands to his daughter even after her marriage and the gift was held binding on the son of the donor. In *Pugalia Vettor Ammal* v. *Vettor Goundan* (3), a gift by a Hindu male owner to his deceased co-parcener's daughter of a reasonable portion of the family estate was held binding on the undivided son of the donor.

In the present case, the gifts were made by a Hindu widow (a qualified owner) to the daughter of her husband's undivided predeceased brother and to the son of another daughter of the said deceased brother. The gift to the niece was after the niece's marriage. (The District Judge's assumption that the brother of the donor's husband was a divided member is clearly erroneous in the face of the plaintiff's own admission in

(1) 22 M. 113.

(2) 10 Ind. Cas. 56; 21 M. L. J. 695; 9 M. L. T. 469; (1911) 1 M. W. N. 422; 35 M. 628.

(3) 13 Ind. Cas. 475; 22 M. L. J. 321; (1912) M. W. N. 89; 11 M. L. T. 103.

her evidence, there being, as we take it, nothing on the record to support the finding of division).

The only question, therefore, in this appeal is whether the principle of the cases above quoted is to be still further extended by allowing a qualified owner like a Hindu widow to exercise the privilege of making gifts of reasonable fractions of her husband's estate to her husband's married niece and to the son of another niece long after the niece's marriages. So far as the gift to the husband's niece's son is concerned, it clearly cannot be upheld as he never was a member of the widow's husband's family, though his mother was a member till her marriage.

The question of the validity of the gift to the niece is not so easy to decide. But there are three difficulties in the way of upholding even that gift:

(*a*) The donor was a Hindu widow who (as we are constrained by precedents to hold) was only a qualified owner.

(*b*) The gift was made in pursuance of an alleged authority given by the donor's husband and that alleged authority has been found to be false, and it is very doubtful whether it is permissible to the donee to fall back on the alleged power of the donor herself to make such a gift even in the absence of a direction by her husband.

(*c*) The gift was made long after the marriage, and not on or about the time of the marriage or the consummation ceremony.

There is no case in which it has been held that a qualified owner like a Hindu widow has the right to make such a gift even to her own daughter after the consummation of the marriage of such daughter, much less to a lady born in her husband's family after the consummation of the lady's marriage.

We, therefore, agree with the lower Appellate Court that the gifts in question in this case are invalid.

But we think that the District Munsif ought to have raised issues on the questions whether the 1st defendant has made improvements on the property gifted to his father and what the value of those improvements is (having regard to the 8th paragraph of the 1st defendant's written statement). If the 1st defendant has made such improvements (as the District Munsif finds in the 11th paragraph of his judgment), we have no doubt that he made the improvements believing in good faith that he was absolutely entitled to the site on which he built the house which forms the improvement.

The learned District Judge's finding on the question of improvements is so indefinite that we are unable to accept it, and we request him to give distinct findings on the two issues above mentioned on the evidence on record and on any further evidence which the parties may adduce. The findings should be submitted within two months from receipt of records and ten days will be allowed for filing objections.

In compliance with the above order the District Judge of Kistna at Masulipatam submitted the following

FINDINGS. * * * * *

5. *Issue* (1). I find that the 1st defendant built a tiled house on the property gifted to his father and that it replaced two old wooden buildings which though destroyed by fire, would not have been likely to last long and were only worth Rs. 100.

6. *Issue* (2). The value of the house at the persent day may, I think, be taken as Rs. 500.

This second appeal coming on for final hearing after the return of the findings of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding. We shall modify the decree in the plaintiff's favour by adding that the plaintiff shall take possession of the house and the materials on the house standing on the plaint house site, only on depositing its value (Rs. 500) into Court to be paid to the 1st defendant and his assigns and representatives. If the plaintiff has taken possession of the house and its materials, she should pay Rs. 500 to the 1st defendant and his assigns with interest at 6 per cent. from the date of her taking possession. The parties will pay and receive proportionate costs in all Courts.

Appeal rejeeted; Decree modified.

PUNJAB CHIEF COURT.

FIRST CIVIL MISCELLANEOUS APPEAL No. 597 OF 1914.

February 15, 1915.

Present:—Justice Sir Donald Johnstone, KT.

SHANKER—JUDGMENT-DEBTOR—APPELLANT

versus

RAM KISHEN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment—Dismissal of suit by first Court—Cessation of surety's liability—Decree by Appellate Court—Security—Appeal, second—Plea of want of registration of security, if allowed.

When a surety pledges property by bond in order to save the property of a defendant attached before judgment under Order XXXVIII of Civil Procedure Code, the liability of the surety or of the property pledged ceases as soon as the suit is dismissed, by the first Court, and that liability is not revived by the Appellate Court decreeing subsequently the plaintiff's claim. [p 271, col. 2.]

Shek Suleman v. *Shivram Bhikaji*, 12 B. 71; *Ma Bi* v. *Kalidas*, 5 Ind. Cas. 985; 5 L. B. R. 156; *Maung Po Khet* v. *Maung San Ya*, 8 Ind. Cas. 980; 3 Bur. L. T. 135, followed.

The plea of want of registration of surety bond cannot be entertained on second appeal when the point has not been raised in the two Courts below. [p. 271, col. 2.]

Joy Gopal Mozoomdar v. *Thoko Monee Dabee*, 11 W. R. 381, followed.

Sarbaland Khan v. *Chanda Singh*, 84 P. R. 1877, referred to.

Miscellaneous first appeal from an order of the Divisional Judge, Ambala, dated the 15th June 1914, reversing that of the Munsif, first Class, Ambala, dated the 5th May 1914, refusing to execute the decree against the surety.

Mr. *Sewa Ram Singh*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.—The facts of this case are simple and are stated by the learned Divisional Judge in his judgment. The first Court held that inasmuch as the suit was dismissed on the original trial, the liability of the surety came to an end. The learned Divisional Judge, however, was of opinion that there is nothing in the surety agreement which confines his liability to the satisfaction of the decree of merely the first Court, that it was an unconditional security for the whole of plaintiff's claim and that the security demanded and taken under Order XXXVIII, rule 5, Civil Procedure Code, was such as would be sufficient to satisfy any decree passed at any stage in the suit. The surety has now come up here with a second appeal and he takes two points:—*First*, that, inasmuch as the surety bond was not registered, it is not admissible in evidence; *secondly*, that upon the dismissal of the suit in the original Court his liability came to an end. With reference to the *first* of these two points Mr. Nand Lal, for the decree-holder, raises the objection that the plea of want of registration, not having been taken in either of the two Courts below, cannot be taken now. Against this Mr. Sewa Ram Singh quotes *Sarbaland Khan* v. *Chanda Singh* (1) and various rulings mentioned at page 29 of Sanjiva Row's Registration Act. Mr. Nand Lal, however, relies upon *Joy Gopal Mozoomdar* v. *Thako Monee Dabee* (2), and my own opinion is that the law is correctly stated there. *Sarbaland Khan* v. *Chanda Singh* (1) is not in point, because there it was only a question of interference by the first Appellate Court. I need not, therefore, express any opinion as to whether the bond required registration or not.

On the merits, however, I entirely agree with the appellant surety. It is quite clear from Order XXXVIII, Civil Procedure Code, and section 145 of the Code that, when a property is attached before judgment, or when a surety on behalf of a defendant pledges property by way of security so as to save the defendant from attachment of his property, the attachment of the defendant's property or the liability of the surety in person or property, as the case may be, comes to an end if the first Court dismisses the suit. In this case the first Court did dismiss the suit and, therefore, the appellant's property and the appellant in person ceased to be liable in any way. The decree-holder appealed against the dismissal of his suit, but did not ask for any *relief before judgment* against the defendant and in my opinion it is, therefore, quite clear that this appeal must succeed. I have looked at *Shek Suleman* v. *Shivram Bhikaji* (3), *Ma Bi* v. *Kalidas* (4) and *Maung Po Khet* v. *Maung San Ya* (5). These rulings seem

(1) 84 P. R. 1877.
(2) 11 W. R. 331.
(3) 12 B. 71.
(4) 5 Ind. Cas. 985; 5 L. B. R. 156.
(5) 8 Ind. Cas. 980; 3 Bur. L. T. 135.

to me to be exactly in accordance with law and in point, and I am not aware of any authority which I am bound to follow, which takes a contrary view.

For these reasons I accept the appeal, set aside the order of the lower Appellate Court and restore that of the first Court. The decree-holder will pay Shankar appellant's costs throughout.

Appeal accepted.

PUNJAB CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 288 OF 1914.

July 22, 1914.

Present:—Mr. Justice Shadi Lal.

Lala DAULAT RAI—PETITIONER

versus

Rai Sahib Pandit WAZIR CHAND AND ANOTHER LIQUIDATORS OF THE HINDUSTAN BANK, LIMITED (IN LIQUIDATION)—RESPONDENTS.

Companies Act (VII of 1913*)*, s. 284, *meaning of—Pending proceedings, if affected by new Act—Interpretation of Statute.*

A construction which leads to absurdity or inconvenience should be avoided, unless the express words of a Statute compel the Court to hold otherwise. [p. 273, col. 1.]

Construction is to be made of all the parts together, and not of one part only by itself. [p. 273, col. 1.]

The plain and rational meaning of section 284 of the Companies Act of 1913 is that the new Act operates upon proceedings arising out of the windings-up which commenced after its enforcement (*i. e.*, 1st April 1914) and that no part of the Act has application to the pending liquidations. [p. 273, col. 2.]

Application, under section 24, Civil Procedure Code, for transfer of certain proceedings under section 214 of the Indian Companies Act, VI of 1882, pending against the petitioner in the Court of the Additional District Judge, Multan, to some other competent Court.

Mr. *Oertel*, for the Petitioner.

Messrs. *C. Bevan Petman* and *Jai Gopal Sethi*, and *Bhai Teja Singh*, for the Respondents.

JUDGMENT.—This is an application by Daulat Rai, late Managing Director of the Hindustan Bank, Limited, now in liquidation, for transfer of certain proceedings under section 214 of the Indian Companies Act, VI of 1882, pending against him in the Court of Lala Damodar Das, Additional District Judge, Multan. I have perused the affidavit of the petitioner and the counter-affidavit of Rai Sahib Pandit Wazir Chand, one of the Liquidators of the Bank, and the explanation submitted by the learned Judge of the Court below. After giving my careful consideration to the above documents and to the very lengthy arguments which have been addressed to me, I have arrived at the conclusion that the petitioner has failed to make out a case for transfer and that this application must be dismissed.

Before dealing with the merits, it is necessary to decide an important question of jurisdiction which arises in the case. The Company went into liquidation in January 1914 when the Act of 1882 was in force. It is clear that under the provisions of that Act, the Court of the District Judge, being the principal Court of original jurisdiction in the District, was competent to hear and adjudicate upon all matters in connection with the winding-up of a Company and that when the winding-up in the present case began, Lala Damodar Das, who was the District Judge at that time, had jurisdiction over proceedings in the liquidation of this Company. It, therefore, follows that if the Act of 1882 had continued to remain in force, no objection to the jurisdiction of the District Court could have been taken. That enactment was, however, repealed by the Indian Companies Act, VII of 1913, which came into force on the 1st of April 1914, and which provides that, unless the Local Government by notification empowers any District Court to exercise jurisdiction under that Act, the Court having that jurisdiction shall be the High Court [*vide* section 3, sub-section (1)]. No notification has so far been issued by the Local Government, and there is no doubt that under the Act of 1913, the Chief Court is the only Court which has jurisdiction in the winding-up of a Company having its registered office in this Province.

The question then arises, whether that Act has retrospective operation and applies to proceedings which began before it came into force. Does it, in other words, deprive a Court of the jurisdiction which it already possessed before the date of its commencement and make subsequent proceedings taken by that Court *coram non judice?* Was it intended that all the liquidation cases pending in the different District Courts should stop abruptly on the 1st of April 1914 and

be transferred bodily to the Chief Court to be dealt with in their further stages by that Court? An answer in the affirmative would lead to a result which could not, in my opinion, have been intended by the Legislature and before I lay down a proposition of that kind, I should like to have some authority in support of it.

Now, it is a sound canon of interpretation of Statutes that a construction which leads to absurdity or inconvenience should be avoided, unless the express words of a Statute compel the Court to hold otherwise.

The learned Counsel for the petitioner has not cited any law in support of his argument that the District Courts ceased, on the 1st of April 1914, to have jurisdiction over cases of which they were already seized. On the other hand, I find that section 284 of the Act of 1913 is sufficiently wide to preserve the existing jurisdiction over cases which began before the commencement of the Act. That section states that "The provisions of this Act with respect to winding-up shall not apply to any Company of which the winding up has commenced before the commencement of this Act, but every such Company shall be wound-up in the same manner and with the same incidents as if this Act had not been passed, and, for the purposes of the winding up, the Indian Companies Act, 1882, shall be deemed to remain in full force." The language of the section is clear and unambiguous, and it would be difficult to find a more explicit and comprehensive provision of law.

The learned Counsel for the petitioner, however, contends that the section has application only to the 'manner' and 'incidents' of the winding-up, and has no reference to the jurisdiction of the Court. I am unable to accept the contention. This argument ignores the opening and the concluding clauses of the sentence, which show unmistakably the intention of the Legislature. It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself. *Incivile est nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere.* Such a survey is always indispensable even when the words are the plainest, for the true meaning of any passage is that which best harmonises with the subject and with every other passage of the Statute (*Vide* Maxwell on the Interpretation of Statutes, 4th Edition, page 42*). If I were to accept the contention put forward on behalf of the petitioner, I would have to apply to the pending proceedings a hybrid law, consisting of a portion of the new Act and of a portion of the old Act. Such a result was, in my judgment, foreign to the intention of the Legislature.

Taking the section as a whole, I have no hesitation in holding that its plain and rational meaning is that the new Act operates upon proceedings arising out of the windings up which commenced after its enforcement and that no part of the Act has application to the pending liquidations.

It is also contended on behalf of the petitioner that, even if the question of jurisdiction is governed by the old Act, Lala Damodar Das ceased to have jurisdiction over the winding-up of the Company when he ceased to be the District Judge and that as an Additional District Judge, he would have been competent to try the case if it had been assigned to him by the District Judge. But no order of assignment was, according to the learned Counsel for the petitioner, passed in the present case. This point was not in clear terms raised in the grounds; and Mr. Petman states that, if he had got notice of it, he would have been prepared to point out an order assigning the case to the Additional District Judge. It appears that Lala Damodar Das was originally the District Judge at Multan and began to hear the winding-up cases in that capacity. Subsequently he was placed on special duty to devote his whole time to those cases and was relieved of other work by another judicial officer who was appointed District Judge. Lala Damodar Das, who then became the Additional District Judge, continued to deal with the Company cases and no objection was ever raised to his jurisdiction, on the ground that a formal order assigning to him those cases had not been passed. *Omnia, præsumuntur rite esse acta* is a salutary rule and finds expression in the explanation to section 114 of the Indian Evidence Act, which says that the Court may presume that judicial and official acts have been regularly performed. I cannot,

*See 5th Edition, page 47.—*Ed.*

therefore, assume that there was no order of assignment. Section 75, sub-section (2), of the Punjab Courts Act, which contains the law on the subject, does not state that the order of assignment must necessarily be in writing, and a verbal order would, in my view, comply with the requirements of law.

For the reasons stated above I am clearly of opinion that Lala Damodar Das was competent to try the case and that the objection based upon want of jurisdiction must be overruled.

Coming now to the application on the merits, I find that the allegations contained in the affidavit of the petitioner have been completely disposed of by the explanation which has been submitted by the learned Judge of the Court below. The explanation is clear and conclusive, and in the face of it, it is difficult to hold that there is any valid ground for making an order of transfer. I want to guard against the possibility of any remarks made by me at this stage causing the slightest prejudice to the petitioner and accordingly consider it unnecessary to deal with the allegations *seriatim*. Suffice it to say that I have gone into the matter carefully and am unable to accede to the suggestion that the procedure of the learned Judge proves any bias or prejudice. There is no doubt that no Director or other officer of a Company likes proceedings started against him under section 214, and any Judge who undertakes to discharge this unpleasant duty and enforce the statutory liability of those directly connected with a Company would be liable to the same objection as has been urged in the present case.

I am at present not concerned with the correctness or otherwise of the order passed by the Additional District Judge. I have simply to see whether the petitioner has satisfied me that there is a reasonable apprehension that he will not have a fair and impartial trial in the Court of the present Judge. As pointed out in *Sher Singh* v *Thakar Das* (1): "It is not every apprehension of the litigant that the superior Court has to take into consideration under the rule. The apprehension must be reasonable, *i.e.*, such as a man of sound sense would regard as legitimately raising the inference of bias. We cannot order a transfer merely because the party applying for it chooses to make unfounded allegations and to misconstrue the most innocent acts of the presiding Judge into indications of bias. To pay regard to the idiosyncracies of litigants in this way would place judicial officers at their mercy and lead to obstruction of public business. It would also promote the filing of unfounded and malicious applications. No man has a *right* to choose his own tribunal or to object to his case being tried in the Court which the law provides for it, unless for good cause."

Having regard to the above exposition of law, I feel no hesitation in holding that the petitioner has entirely failed to point out any act of the learned Judge which indicates bias, or is likely to create a reasonable apprehension thereof. I must, therefore, dismiss this application with costs.

Application dismissed.

(1) 88 P. R. 1903; 17 P. L. R. 1904.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1739 OF 1914.

April 23, 1915.

Present:—Mr. Justice Chamier.

AMIR SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

CHHATTAR SINGH AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Execution—Uncertified payment under decree, recognization of—Instalment decree—Default—Limitation Act (IX of 1908), Sch. I, Art. 182 (7).

An uncertified payment under a decree cannot be recognized for any purpose under the new Code of Civil Procedure. [p. 275, col. 1.]

Where a decree provides for payment of the money due under it in instalments and in case of default in payment of any of the instalments, the whole amount becomes payable at once, an application for execution should be made within three years of the first default. [p. 275, col 1.]

Execution second appeal from the decision of the District Judge of Meerut, dated the 24th June 1914.

Mr. *Mohan Lal Sandal*, for the Appellant.

The Hon'ble Mr. *Gokul Prasad*, for the Respondents.

JUDGMENT.—This appeal arises out of an application made on November 12th, 1913, for execution of a decree dated May the 10th, 1909. The decree was for a considerable sum of money to be paid in certain instalments. The first instalment amounting to Rs. 124 was to be paid at the end of *Aghan Sambat*, 1966 corresponding with December the 26th, 1909. The second instalment amounting to Rs. 62 was to be paid at the end of *Jeth Sambat* 1967. Subsequent instalments of Rs. 62 each were to be paid at the end of *Aghan* and at the end of *Jeth* till the whole decree was satisfied. In case of default the whole amount became payable at once. The decree-holders in their application of November 12th, 1913 stated that they had received the first four instalments, but that there had been a default in payment of the instalment due at the end of *Aghan Sambat* 1968, and they, therefore, claimed the whole amount remaining due under the decree. Payment of the first 4 instalments was not certified to the Court or recorded by the Court and, therefore, cannot be recognized by any Court executing the decree. The learned Vakil for the decree-holders relies upon a decision of this Court based upon section 258 of the Civil Procedure Code of 1882, but the words relied upon by this Court as justifying the view that a Court might recognize an uncertified payment for some purposes, have now disappeared from the Code with the result that an uncertified payment cannot be recognized for any purpose, certainly not for the purpose of saving limitation. The decree in question provides in plain terms that if there is default in payment of any instalment, the whole amount of the decree shall become payable. It has been held in a large number of cases that clause (7) in the 3rd column of Article 182 of Schedule I to the Limitation Act applies to such a provision as this. The only point on which there is any room for doubt is whether the decree directed payment to be made on a certain date. The decree directs that instalments are to be paid on or before the last day of *Aghan* and *Jeth*, and that if there is default, the whole amount shall become payable at once This appears to me to bring the case within clause (7), and I hold that the application for execution should have been made within three years of the 1st default. The decree-holders being unable to prove that any instalments have been paid, I must take it that the first default occurred at the end of *Aghan Sambat* 1966. Therefore, the present application for execution, made more than three years after that time, is barred by limitation and should have been dismissed I was referred to a judgment of the Bombay High Court in a case in which the effect of subsequent payment and acceptance of overdue instalments was discussed. It appears to have no bearing on the present case, as it is not suggested that there was acceptance of an overdue instalment or anything in the shape of waiver which would affect the period prescribed by the Limitation Act. I allow this appeal, set aside the order of the Court below and dismiss the respondents' application for execution with costs throughout. Costs in this Court will include fees on the higher scale.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 71 OF 1913.

March 9, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

MARIAN BEEVIAMMAL—PLAINTIFF—APPELLANT

versus

KADIR MEERA SAHIB TARAGAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Heirs of deceased Muhammadan—Tenants-in-common—Heir, one, right of, when barred—Adverse possession—Knowledge—Execution suit for share—Limitation Act (IX of 1908), Sch. I, Arts. 120, 144, when applicable.

To a suit brought by one of the heirs to recover his share of the estate left by a Muhammadan who died intestate, Article 144 of the Limitation Act is applicable if the property is immoveable, but if it is moveable, Article 120 is applicable. [p. 278, col. 1.]

Khadersa Hajee Bappu v. *Puthen Veettil Ayissa Ummah*, 6 Ind. Cas. 59; 8 M. L. T. 4; 20 M. L. J. 288; 34 M. 511; (1910) M. W. N. 447, followed.

The heirs of a deceased Muhammadan take as tenants-in-common and the right of one heir to a share will not become barred, unless and until the other heirs set up an adverse right to the knowledge of that heir. Mere intention on their part will not affect the character of possession, nor is the heir bound to inquire whether there has been an adverse dealing with his property. [p. 278, col 1.]

Corea v. *Appuhamy*, (1912) A. C. 230; 105 L. T. 836; 81 L. J. P. C. 151, referred to.

Where the other heirs are in entire charge of property, the heir sought to be excluded is not bound to assure himself that he is not excluded from inherit-

ance and that his interests will not be looked after by them. [p. 278, col. 2.]

The right of an heir to claim interest arises only from the date when he makes a demand and that is met by a refusal. [p. 278, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge of Tinnevelly, in Original Suit No. 56 of 1911.

FACTS.—The plaintiff, a Muhammadan lady, brought a suit in the Sub-Court of Tinnevelly for her share of her husband's property, who died in 1899 leaving seven children. She alleged that her son and her step-sons had defrauded her to the extent of 1/8th of Rs. 28,000 which was her share of the cash left by her husband. The step-sons pleaded that there had been no fraud and that their father had given each of his sons 100 sovereigns before his death and directed that the remaining cash should be divided into seven shares after his death to the exclusion of the plaintiff. The Subordinate Judge dismissed the suit as barred by limitation, being 23 years after her husband's death.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant, contended that the plaintiff was unaware of the existence of the large sum of money at the time of her husband's death and her step-sons had fraudulently concealed the fact from her.

Mr. *M. D. Deradoss*, for the Respondents, contended that the plaintiff was a tenant-in-common and though Article 120 of the Limitation Act applied, there was no proof that there was any demand by the plaintiff within six years before suit, and that the defendants held the property in such a way as to extinguish her right.

JUDGMENT.—The suit was brought in November 1911 by the plaintiff, a Muhammadan lady, to recover her share of the property left by her husband, Alli Mallik Mudalia Taraganar, who died on the 14th April 1889 leaving him surviving his sons by his predeceased wives, and the plaintiff and her son, the 5th defendant.

The Subordinate Judge held, that the plaintiff's deceased husband left all his property to his sons with the knowledge and consent of the plaintiff and that these latter had subsequently effected a partition among themselves of the property left by their father, also with the consent of the plaintiff and that the plaintiff's claim, if any, is now barred by limitation. The plaintiff appeals.

In 1878 the deceased Mudalia Taraganar effected a partition between himself and his four sons by his second wife then deceased. The property was divided into eight shares, each of the four sons of the second wife getting a share, and Mudalia Taraganar, his third wife, and his two sons by the third wife (the 3rd and 4th defendants) each getting a share. Mudalia Taraganar seems to have retained in his own hands the shares of the 3rd and 4th defendants and of his third wife. The property that was then divided into eight equal shares was valued at Rs. 64,405-10-6 (Exhibit II). In 1889 there was another partition. See Exhibit III. The 3rd wife had then died. The property which was then estimated to be of the value of Rs. 2?,271-15-5 was divided into four shares, the father, the deceased Mudalia Taraganar, his two sons by the third wife (the 3rd and 4th defendants), his son by the plaintiff (*i. e.*, the 5th defendant) each getting a share of the value of Rs. 7,067-15-10. With respect to the share of Mudalia Taraganar, it was settled that after his death the *mahar* due to his wife less the value of the jewels given to her should be paid out of his share and the remainder should be divided equally between his seven sons. No share was set apart for the plaintiff. On the 8th March that is 14 days after the partition-deed, Exhibit III, the father, Mudalia Taraganar, made his Will by which he appointed the 4th defendant as the guardian of the 5th defendant, who was then an infant. He was to submit his accounts to the other brothers and maintain the plaintiff out of the income of the 5th defendant's estate. It is the defendants' case that four or five days after making this Will he gave all his sons 100 sovereigns each in the presence of the plaintiff, and that he directed a division of the cash kept by him into seven shares after his death and that the plaintiff assented to this. They also allege that some months after their father's death they divided the property left by him in accordance with his directions into seven shares with the plaintiff's knowledge and that the 5th defendant's share was delivered to the 4th defendant. As to the value of the property left by him which is divided into seven shares, there is no dispute. The total value of the properties, including the 600 sovereigns alleged to have been

given by their deceased father to his sons, is stated to be Rs. 25,473 in the plaint, and this value is accepted by the defendants. It is the plaintiff's 1/8th share of this amount, Rs. 3,184-2, together with interest that she seeks to recover in this suit.

The questions for decision are: (1) whether the father gave his sons 100 sovereigns each in his life-time; (2) whether there was a partition of the remaining properties with the knowledge and consent of the plaintiff and whether the plaintiff waived her claim to her share; and (3) whether the plaintiff's suit is barred by limitation.

As to the distribution of 100 sovereigns to each of his sons, evidence is given on behalf of the plaintiff to the effect that her husband was unconscious at the time he is alleged to have given the sovereigns to his sons. The burden of proof, however, is on the defendants and we have, therefore, to consider the evidence adduced on their behalf. The 3rd defendant, as defendants' 1st witness, the 4th defendant, as defendants' 2nd witness, and the 1st defendant, as defendants' 10th witness, swear that their father was not unconscious as stated by plaintiff's witnesses, but that he gave to his sons 100 sovereigns in plaintiff's presence and he directed a division of the sovereigns into seven shares after his death and that the plaintiff assented to this. The defendants' 3rd witness, who was a farm servant under the deceased father, and the 4th witness, who is the brother of defendants Nos. 6 and 12 and a cousin of the 1st and 2nd defendants, support this evidence. Except the 3rd witness all the others are interested. The Subordinate Judge refers to a credit entry in the account book kept by the 4th defendant of the 5th defendant's estate showing that 100 sovereigns worth Rs. 1,500 were given to the 5th defendant for his 1/5th share on the 26th *Masi* (12th March). The first entry relating to this gives no date, the entry above being dated 26th *Masi* 1064. But there is another entry which gives the date 26th *Masi*. That is the date of the execution and registration of the Will. But the oral evidence of the defendants is clear that it was not on the day the Will was registered, but four days after that, that the sovereigns were given to the defendants by their father. The book itself does not appear to be one kept in the ordinary course of business. These entries do not find a place in the day book. The 1st defendant does not produce his account book: neither does the 4th defendant. He says he has no account book of his own, but keeps an account book, Exhibit B, for the 3rd defendant whose affairs he manages, and that account book does not contain a similar entry. The story is not probable. Their father had already made his Will in anticipation of his death and if he was going to distribute his money amongst his sons, no reason is alleged why he should have distributed a few and reserved the rest. The documentary evidence, far from supporting the defendants' oral evidence, as we have pointed out, rather contradicts it. We are, therefore, unable to accept the story told by the defendants.

That the defendants divided the property left by their father among themselves is true. But that would not affect the plaintiff's claim, unless it is shown that she is estopped from putting it forward. No estoppel is pleaded. Assuming that she was aware of the fact of partition among themselves, mere knowledge alone will not create an estoppel.

The next question is whether the plaintiff's claim is barred by limitation. The plaintiff's claim is alleged not to be barred on two grounds. *First*, it is alleged that the defendants are guilty of fraud· *secondly*, it is said that the possession of the defendants was that of tenants-in-common. We are not satisfied that the defendants have been guilty of any fraud and that the plaintiff was accordingly kept by them in ignorance of the facts.

The plaintiff states that after her husband's death she found his door open, that she asked the defendants, whether he had left any property and that the defendants assured her that he had left none. This statement by the plaintiff is uncorroborated and we are not prepared to find, on her unsupported evidence, any fraud on the part of the defendants. The evidence shows that her property was in the hands of the defendants. She did not care to press her claims and she was willing to leave everything in the hands of the defendants. She knew she was entitled to get her dower. She was aware that the defendants were bound to

pay it to her and yet she did not make any effective demand for nearly 20 years. It is not likely, therefore, that though she must have known that her husband had left properties and though she also must have known that these defendants were in possession of them, she would have claimed any. All that can be said against the defendants is that they were under a moral obligation to pay to her her share of the property left by her husband and that they did not either inform her of her interest or take the trouble to give her share to her, but that, on the other hand, they distributed it among themselves, and that they had committed a fraud which would bring the case under section 18 of the Limitation Act. It has now been decided that in suits brought by one of the heirs to recover his share of the estate left by a Muhammadan who dies intestate, Article 123 of the Limitation Act does not apply as the estate is at once vested in the heirs as tenants-in-common. It was pointed out that Article 123 only applies to suits against executors and administrators or other persons whose legal duty it is to distribute the estate among certain persons. This has been held by a Full Bench of this Court. In the case of immoveable property Article 144 is applicable, and in the case of moveable property Article 120 is applicable. See *Khadersa Hajee Bappu* v. *Puthen Veettil Ayissa Ummah* (1). We are bound by this decision and accordingly hold that Article 120 applies to the case before us. The defendants having taken possession of the property as tenants-in-common, they must be deemed to have been in possession of such property on behalf of themselves and of the plaintiff and it lies on them to show that so far as the plaintiff is concerned, the character of their possession was changed six years before the date of their suit. The judgment of the Judicial Commitee in *Corea* v. *Appuhamy* (2) would show that mere intention on their part is not enough to change the character of that possession. Nor is it sufficient to show that if the plaintiff had inquired, she might have found out that they had divided the property among themselves. When the plaintiff's husband died she was about 18 years of age. One of these defendants was appointed by her husband as her son's guardian. They were her relatives under whose protection and control she was, living and who were supporting her. She was therefore, entitled to assume that her interests would be looked after by them. In these circumstances, we cannot assume there was sufficient notice to her that her property was being dealt with by the defendants as their own, even assuming that such knowledge would be sufficient. Applying the principle laid down by their Lordships we must hold that the plaintiff's claim is not barred.

The plaintiff, however, has not proved that she had made any demand for her share; nor is it proved that the defendants have realised any interest on the property left with them. The plaintiff is not, therefore, entitled to recover any interest before the date of the suit. The plaintiff is entitled to get Rs. 3,184-2-0 for her 1/8th share. The 1st, 2nd, 3rd, 4th and 5th defendants must each pay her one-seventh of the amount payable to her. Defendants Nos. 6 to 11 as the representatives of Kunjoor Taraganar must pay her one-seventh, and defendants Nos. 12 to 16 as the representatives of Muhammad Moideen Taraganar must also pay her one-seventh. The plaintiff is entitled to her proportionate costs throughout.

Appeal partly allowed.

(1) 6 Ind. Cas. 50; 34 M. 511; 8 M. L. T. 4; 20 M. L. J. 288; (1910) M. W. N. 447.

(2) (1912) App. Cas. 230; 105 L. T. 836; 81 L. J. P. C. 151.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 20 OF 1913.

April 30, 1915.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

BALDEO THAKURAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

UGRA NATH MISRA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Regulation XI of 1825, *s.* 4—*By gradual, slow and imperceptible means—Burden of proof—Small villages—Small river—Large accretions, if by gradual, slow and imperceptible means—Adverse possession—Land under water for certain period*—Vis major—*Possession during such period—Presumption.*

BALDEO THAKURAI *v.* UGRA NATH.

Where the question is of the manner in which land has been cut away from one village and thrown up on the other side of the river, the burden of proof is on the party who claims the accretion to show that the accretion to his tenure has been of the nature contemplated by the law as laid down in Regulation XI of 1825 and unless he can prove this satisfactorily, he cannot be said to have proved his title. [p. 281, col. 1.]

Where the villages are small in area and their common boundary but short in length and where there is a small river, shallow and fordable, which at one season of the year is liable to sudden floods cutting away a portion from the small estates:

Held, that under the circumstances the accretions of a few *bighas* per annum can hardly be said to be by gradual, slow and imperceptible means as contemplated by the Regulation. [p. 281, col. 2.]

A person cannot be said to have acquired a title by prescription to a land which remains covered with the flood water of a river for a certain period every year, as he must be deemed to have been dispossessed by *vis major* during the time of flood and as under law the possession during flood time is in the person who has title. [p. 282, col. 1.]

First appeal from the decision of the Additional District Judge of Gorakhpur, dated the 11th of October 1912.

The Hon'ble Dr. *Sunder Lal*, for the Appellants.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—The circumstances out of which this present appeal has arisen are as follows :—

The village of Purnian, which belongs to the plaintiffs-respondents, and the village of Chatrapar, which belongs to the defendants-appellants, are situated in the northern part of the Basti District. What is known as the Bilar Nadi flowed between them and at the last Settlement formed the boundary.

A reference to the Settlement Report and the maps attached thereto shows that what is called the Bilar river is really a bed of the Burhi Rapti, which falls into the larger Rapti river.

The Banganga, a hill torrent, flows into the Burhi Rapti and it apparently forced the latter river into another and more direct channel towards the Rapti. From the junction of the Banganga the old course of the Burhi Rapti is called the Bilar Nadi. At the time of the last Settlement, however, it was noted that Burhi Rapti after its junction with the Banganga was sending a greater part of its volume of water down the Bilar Nadi. The result of this has been that in places the Bilar has been cutting away its banks and altering its course.

This admittedly has happened in that portion of its course which lies between the two villages in the present case.

The plaintiffs have filed a map, which fairly accurately shows the position as regards these two villages which the river occupied at the time of Settlement and on the date of suit. One point will be noticed, that is that at Settlement time the boundary between the two villages was the mid-stream and that it was but a short one.

The plaintiffs' case is as follows :—

(1) that by custom the boundary between the two villages has always been the mid-stream line of the river, any land cut away from either village by a change in the course going to the owner of the other village;

(2) that the river has been gradually encroaching on the lands of Chatrapar and adding land to Purnian;

(3) that out of a total area of 43 *bighas* 9 *biswas* and 15 *dhurs* thus added to their village, an area of 26 *bighas* 2 *biswas* and 6 *dhurs* of land were added up to 1304 *Fasli* and 17 *bighas* 7 *biswas* 9 *dhurs* have been added since 1304 *Fasli*;

(4) that the land in question has been in the proprietary and adverse possession of the plaintiffs as of right;

(5) that the Revenue Authorities have surveyed the land and have held that a part of it is in possession of the defendants, and have passed an order adverse to the plaintiffs;

(6) that the plaintiffs being still in possession are entitled to a declaration of their title as proprietors, and if they be found not to be in possession, possession may be awarded to them.

The defendants pleaded:

(1) that they, and not the plaintiffs, were in possession;

(2) that the lands in question had been suddenly cut away in the year 1314 *Fasli*;

(3) that there was no such custom, as alleged by the plaintiffs, under which the mid-stream was always the boundary between the villages;

(4) that the Bilar is not a navigable river and that rules of law as to alluvion and diluvion did not apply in the case of such a small shallow stream.

The Court below held as follows :—

(1) that the plaintiffs were in possession;

(2) that the custom alleged by the plaintiffs was not proved;

(3) that the provisions of section 4, clause I, Regulation XI of 1825, were applicable to the case and that the land in dispute had been gradually cut away from Chandrapar and added to Purnian and, therefore, the plaintiffs in law were the owners thereof. Accordingly the suit was decreed as to the declaration.

The defendants appeal. The first ground of appeal is not pressed.

The points pressed are:

(1) that the plaintiffs have failed to prove possession;

(2) that the law laid down in Regulation XI of 1825 does not apply to the case of a small shallow stream like the Bilar and that the land, being within the boundaries of the *mahal* settled with the defendants, is their property;

(3) that the area in quesion has not been shown to have been added to the plaintiffs' village by gradual, slow and imperceptible means and, therefore, the plaintiffs at no time acquired title.

On behalf of the respondents it is admitted that the custom of "Dhar-dhura" cannot be pressed, but it is pleaded:

(1) that the plaintiffs' possession is established;

(2) that Regulation XI of 1825 applies;

(3) that the accretion has been gradual and imperceptible and the plaintiffs have thus acquired title;

(4) that in any event the plaintiffs have been in adverse possession and have acquired a title by prescription.

In regard to the application of Regulation XI of 1825, we shall assume for the purposes of this appeal that the law as laid down therein does apply. In the view that we take of the facts it is unnecessary for us to decide the question.

We cannot agree with the Court below that the plaintiffs have proved either their possession or that the accretion has been by slow, gradual and imperceptible means as contemplated by section IV of the Regulation.

Furthermore, in the circumstances disclosed by the evidence of the plaintiffs' own witnesses, the plaintiffs could not have acquired title by prescription. In regard to possession we must point out that the burden was on the plaintiffs. The land in dispute admittedly lies within the ambit of the defendants' *zemindari*, and the land revenue assessed thereon has been paid by the defendants. The plaintiffs do not pretend to have ever paid any Government dues for it. They claim that land which at Settlement time was in the defendants' *mahal* is now in their possession and belongs to them, simply by reason of the action of the river. The burden is heavily on them to prove their possession.

Both sides called witnesses who swear in favour of those who have called them and as the lower Court has observed, the oral evidence one the one side is just as good as that on the other and it is not possible to come to a satisfactory conclusion as to which side is telling the truth, unless there is something else to guide the Court.

Documentary evidence as to possession there is *nil*. The villages are not subject to quinquennial Settlement. The *patwari* of Purnian has never recorded these lands in his records. The *patwari* of Chandrapar has recorded them as having been cut away by the river. It is highly probable that little heed has been paid until recent years to the lands, as they were sandy waste at first and have only slowly become culturable; and then the dispute arose in the Revenue Courts.

The lower Court has given some curious reasons for holding that the plaintiffs' case must be a true one:

(1) that the land having been gradually cut away and removed to the other side of the river, it is far more likely that the people on the other side should cultivate rather than that the people of Chandrapar should take the trouble to cross the river with their ploughs and oxen.

In the *first* place as, the plaintiffs' own village *patwari* shows, during the rainy season the land is under water and not culturable and during the rest of the

year the stream is shallow and fordable nearly everywhere. During the rains both sets of *zemindars* work their own ferries and the village of Chatrapar is at no greater distance appreciably from the spot than that of Purnian. A great deal of the land is even now uncultivated and the rest must have come very slowly under cultivation. Seeing how tenaciously these *zemindars* cling to their lands and how often riots take place over such cases, we can see no reason to hold that it is far more probable that the Purnian men cultivated than that the Chatrapar men did so. There was no great trouble involved in fording a shallow stream. Next, the Court below considers that because there has been no riot, therefore the Purnian men must have cultivated without let or hindrance. There is no reason to hold that the Purnian men are less law-abiding than the Chatrapar men.

Lastly, the lower Court considers that because in other similar cases in other villages along the Banganga and one or two on the Bilar the people of the villages to which land has been added have been allowed to retain such lands, therefore this must have been done in the present case.

As evidence of actual possession these instances are quite inadmissible; they were put forward simply as evidence of the custom of "Dhar-dhura."

In our opinion there are no circumstances outside the oral evidence which go to show that the plaintiffs rather than the defendants are in possession. The presumption is that the real owners, the defendants, who are paying the revenue are in possession. The oral evidence to prove the plaintiffs' possession is unsatisfactory and we, therefore, hold that the plaintiffs have failed to satisfactorily establish their possession.

The *next* point is the question of the manner in which the land has been cut away from the one village and thrown up on the other side of the river. The burden of proof is on the plaintiffs to show that the accretion to their tenure has been of the nature contemplated by the law as laid down in the Regulation mentioned and unless they can prove this satisfactorily, they cannot be said to have proved their title.

Their case is that the accretion commenced in 1295 *Fasli* and then up to 1304 *Fasli*, *i.e.* in 10 years, an area of 26 *bighas* 2 *biswas* and 6 *dhurs* was added to their village and that from 1304 *Fasli* up to 1315 *Fasli*, *i. e.* in 11 years, an area of 17 *bighas* 7 *biswas* and 9 *dhurs* has been added. The average accretion according to this was 2 *bigha* odd per annum for the whole period. In the period from 1295 *Fasli* the average was a little higher and in the second period somewhat lower.

There is no documentary evidence to show what area was added in any or each of the years in question, as apparently no measurements were ever made until the dispute arose in the Revenue Court. The plaintiffs have to depend on oral evidence only. They have called their *patwari* and some cultivators and neighbours, who state in a general way that the river has gradually cut away its banks and that each year an area of from one to four *bighas* has been thrown up on the other side; they cannot state what area accreted in any one year.

The *patwari* has only held his post as such for a period of 13 years and he found a considerable area on the Purnian side at the time of his appointment. The evidence of several witnesses is to the effect that the river has shifted its bed every year, but the extent of its movement in any one year is not given.

One fact is clear. It is only during the three months of the rainy season that the erosion takes place. At other periods the river is shallow and fordable and flows in a very gentle stream.

The boundary between the two villages at Settlement time was but a short one, judging by the map. Its exact length has not been proved, but neither of the villages is large in area. They are roughly speaking about 500 Government *bighas* each. If the boundary between the two villages had been of considerable length and the villages of any great size, then the cutting away of a narrow long strip and its addition to the other village might well be said to be an accretion by gradual, slow and imperceptible means, the area thus added being but a few Govenment *bighas* per annum.

But where the villages are small in area and their common boundary but short in length, the removal of only a few *bighas* per annum can hardly be said to be by gradual, slow and imperceptible means. The

erosion takes place only in the rainy season. There is not a constant, slow, daily cutting away, spread over a long period. As each flood has come and receded, the area cut away and added to the other side must in the case of these two small villages have been very perceptible. The proportion cut away each year is considerable, though the actual area is not great. Such an area would be of little consequence in the case of large estates on the banks of great rivers containing large volumes of water all through the year. In the present case we have a small river, shallow and fordable, which at one season of the year is liable to sudden floods, cutting away portions from small estates.

We find it impossible to hold that the accretion in this case has been that gradual slow and imperceptible accretion contemplated by the Regulation.

There remains the question of title acquired by prescription. Even assuming that the plaintiffs have cultivated those portions of the land which became culturable, we have it from the mouth of their own *patwari* that the land is only culturable in the *rabi* season, that it is every year covered with the flood water. While the floods are over the land, the plaintiffs cannot be said to have remained in possession. They have been then dispossessed by *vis major* and in the eyes of the law, the possession during flood time will be deemed to have been in the defendants who had title. To acquire a title by prescription the plaintiffs must hold continuously for a period of 12 years. In the circumstances it has been impossible for them to do this and, therefore, impossible for them to acquire title by adverse posession for a period of 12 years.

The law on this point is covered by a decision of their Lordships of the Privy Council and is not contested before us. In our opinion the plaintiffs have failed to prove any title to the land. The custom alleged has not been pressed before us and the lower Court has decided that point in favour of the appellants. We, therefore, allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts, including in this Court fees on the higher scale.

Appeal allowed.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 26 OF 1911.

March 31, 1915.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

ABED KHONDKAR AND OTHERS—
DEFENDANTS—APPELLANTS

versus

MOHENDRA LAL DE AND OTHERS—
PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 624, 626, 629—*Review of judgment "Strict proof", meaning of —Objections- Proper safeguards- Formaliti s—Sufficiency of proof—Appellate Court's jurisdiction.*

Per *Jenkins, C. J.*—"Strict proof" means anything which may serve directly or indirectly to convince a Court and has been brought before the Court in legal form and in compliance with the law of evidence. It is the formality which is prescribed and not the result that is described. [p. 284, col. 1.]

Section 629 of the Code of Civil Procedure, Act XIV of 1882, limits the grounds on which objections may be taken to the admission of a revie'; an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a tribunal that has no power to grant it. [p. 284, cols. 1 & 2.]

Without proper safeguards, the Court of first instance is, the proper Court to determine whether or not there should be a review, but before a review is granted those safeguards must be observed. [p. 284, col. 2.]

Per *Woodroffe, J.*—The term 'strict', Order XLVII, rule 2 (*b*), refers to formalities, such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination, and so forth. If such legal evidence be wanting objection may be made in appeal under Order XLVII, rule 7, which does not refer to the weight or sufficiency of the evidence. If the legal formalities are observed it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. [p 285, col. 1.]

"Strict proof" means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. [p. 285, col 1.]

Gyanund Asram v. *Bepin Mohan Sen*, 22 C 734; *Bhyrub Chunder Surmah Chowdhry* v. *Madhubram Surmah*, 11 B L. R. (F.B.) 423; 20 W. R. 84; *Chunder Churn Aggrodany* v. *Lo dunram Deb*, 25 W R. 324; *Koleemooddeen Mundul* v. *Heerun Mundul*, 24 W. R. 186, referred to.

Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, but the question of sufficiency of evidence is for the Court admitting the review. [p. 285, c l. 2.]

Appeal against the decree of the Hon'ble Mr. Justice N. Chatterjea, Judge of the Calcutta High Court, dated the 23rd January 1911, in Appeal from Appellate Decree No. 1181 of 1909.

ABED KHONDKAR *v.* MOHENDRA LAL.

Babu *Jnanendra Nath Sarkar*, for the Appellants.

Babu *Shiva Prasanna Bhattacharjya*, for the Respondents.

JUDGMENT.

JENKINS, C. J.—This is an appeal under the Letters Patent from a judgment of Mr. Justice Nalini Ranjan Chatterjea, before whom the case came by way of appeal from an appellate decree. The question that arises is as to the competence of an Appellate Court to question the propriety of a review granted by the Court of first instance, on the ground that the evidence in support of the application should not have been believed.

This suit is one for rent, and in the first instance it was decided adversely to the defendants' contention. The defendants, as a result of what appeared in the course of the trial, became aware of some new and important matter or evidence and as a result of that made an application to the Court of first instance for a review. The review was granted, because it appeared to the Court that there was strict proof of the allegation of the discovery of new and important matter or evidence not within the knowledge of the applicants and because that strict proof convinced the Court of first instance. The result was that the review having been granted, the case was re-heard and a decree passed favourable to the defendants. From that decree an appeal was preferred by the plaintiffs, who objected not only on the merits but on the ground that the review should not have been granted. The lower Appellate Court has dealt with the second of these contentions and has held that the review was *ultra vires* or beyond the jurisdiction of the Court of first instance, so that the first decree was restored. The position of the defendants became this: that the decree in their favour was set aside and the first decree stood without their having any right to appeal therefrom. From this decree of the lower Appellate Court there was an appeal to this Court, which was heard by Mr. Justice Nalini Ranjan Chatterjee to whom it appeared that the decision of the lower Appellate Court was correct, and it is in these circumstances that the matter now comes before us by way of appeal under the letters patent.

The propriety of the course adopted by the learned Judge of first instance in granting the application for review is to be determined by reference to the provisions of the old Code which are substantially reproduced, though with a slight variation, in the present Code. Section 623 permits an application for a review of a judgment and provides that it may be made by any person considering himself aggrieved, who from the discovery of new and important matter or evidence, which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, desires to obtain a review of the decree passed or order made against him. It is only with that part of the section that we are now concerned. Section 624 provides that, "Except upon the ground of the discovery of such new and important matter or evidence as aforesaid, or of some clerical error apparent on the face of the decree, no application for a review of judgment, other than that of a High Court, shall be made to any Judge other than the Judge who delivered it." Section 626 provides that, "If it appears to the Court that there is not sufficient ground for a review, it shall reject the application. If the Court be of opinion that the application for the review should be granted, it shall grant the same, and the Judge shall record with his own hand his reasons for such opinion: Provided that (*a*) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree a review of which is applied for; and (*b*) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him, when the decree or order was passed, without strict proof of such allegation; and (*c*) an application made under section 624 to the Judge who delivered the judgment may, if that Judge has ordered notice to issue under proviso (*a*) to this section, be disposed of by his successor." It is only necessary now to refer to section 629 which provides that, "An order of the Court for rejecting the application shall be final; but, whenever such application is admitted, the admission may be objected to on the ground

that it was—(*a*) in contravention of the provisions of section 624, (*b*) in contravention of the provisions of section 626, or (*c*) after the expiration of the period of limitation prescribed therefor, and without sufficient cause. Such objection may be made at once by an appeal against the order granting the application, or may be taken in any appeal against the final decree or order made in the suit." No provision is made in section 588 of the old Code for an appeal from order in the case of an order granting a review; and the power to appeal, such as it is, rests on section 629 alone. It is in that respect that there is a slight difference between the old and the present Code.

The view taken by Mr. Justice Chatterjea in affirming the lower Appellate Court is that "strict proof" means proof that convinced the lower Appellate Court, and it is on that ground and on that ground alone that the result can be affirmed. In my opinion this is not the true view of the provisions of this chapter relating to review of judgments. The word "proof" ordinarily has one of two meanings: either the conviction of the judicial mind on a certain fact, or the means which may help towards arriving at that conviction. The use of word 'strict' seems to me to point to the second of these two meanings, and the strict proof, in my opinion, means anything which may serve directly or indirectly to convince a Court, and has been brought before the Court in legal form and in compliance with the requirements of the law of evidence. It is the formality which is prescribed and not the result that is described. This I think is apparent from the whole scheme of this Chapter on review. For instance, we find on one side that the rejection of an application for a review is final. There is no enquiry into the merits. On the other hand, we find that the granting of a review is not final, and as I read the Chapter it means that when a review is granted, certain formalities have to be observed—formalities designed to secure that the application for review should not be too readily and thus improperly granted. An examination of section 629 appears to me to support that view. It limits the grounds on which objections may be taken to the admission of a review; and the first ground described shows that an objection may be taken when the admission has been in contravention of the provisions of section 624, that is to say, it has been made to a tribunal that has no power to grant it. Passing over for a moment section 629 (*b*) we find that another objection allowed by section 620 (*c*) is that the application is made after the expiration of the period of limitation prescribed therefor and without sufficient cause. Then we come to the only other objection, which is that it is in contravention of the provisions of section 626; and section 626, so far as it relates to this topic, requires that there should be strict proof of the allegation. That appears to me to mean that there must be proof adduced before the Court that has to deal originally with the question of granting a review. Where there has been placed before that Court such evidence or other mode of proof as the law requires and permits, I cannot think that it was intended that on appeal under section6 29 it was to be open to the Appeal Court to say, though there has been legal evidence, and in that sense strict proof, that the proof did not convince it, though it convinced the Judge who heard the witnesses and, therefore, the application and the order granting the review were *ultra vires* and beyond the competence of the Court. That would bring about a state of affairs most undesirable and would bring into litigation fresh elements of chances and speculation. I think that the whole scheme of the Act recognises that with proper safeguards the Court of first instance is the proper Court to determine whether or not there should be a review, but that before a review is granted those safeguards must be observed. These safe guards have been observed in this case. I, therefore, think that the judgment of Mr. Justice Chatterjee is erroneous and must be set aside, and so also the decree of the lower Appellate Court. The case must, therefore, go back to the lower Appellate Court to be re heard on the merits. The appellants before us are entitled to all the costs in the High Court.

WOODROFFE, J.—The learned Subordinate Judge has held that an Appellate Court can consider whether there was strict proof of the allegations on which an application for a review was made. Assuming for the sake

of argument that this is so, a question arises, what is the meaning of strict proof. The Subordinate Judge was in effect of opinion that though the evidence was presented with strict formality, he could reject it as not being strict, because in his opinion it was insufficient, that is, lacking sufficient probative force in his eye to establish the allegations of the party applying for a review. I do not think this is correct. The term "strict" refers in this section, in my opinion, to formalities. Thus the section requires that formalities of law should be observed such as issue of notices, taking of evidence on oath or affirmation, legal proof of documents, cross-examination so forth. If such legal evidence be wanting, objection may be made in appeal under Order XLVII, rule 7. This rule does not, I think, refer to the weight or sufficiency of the evidence. If the legal formalities are observed, it is no objection that the probative force of evidence legally taken appears to be different to the Appellate Court from what it appeared to the Court granting review. In the present case the evidence was legally taken, but the Appellate Court disbelieved the evidence. The latter after criticising the evidence says that he disbelieves it, and because the first Court did believe, held that it was acting *ultra vires*. As an instance of the nature of the ground upon which the lower Appellate Court proceeded, I may refer to the following passage in his judgment: "Then it is not at all likely that the defendants would forget all about their own rent receipts which they had filed in a previous suit regarding this very property. I, therefore, disbelieve their story." "Strict proof," in my opinion, means proof according to the formalities of law. It does not refer to sufficiency of proof in securing a particular conviction. Thus an appeal has been allowed where the Judge has not recorded his reasons for granting an application for a review. [See the case of *Gyanund Asram* v. *Bepin Mohan Sen* (1)], or where he granted a review without inquiry or proof that the evidence was not within the knowledge of the applicant at the hearing or could not be adduced by him before the decree was passed. [See the case of *Bhyrub Chunder Surmah Chowdhry* v. *Madhubram Surmah* (2)], or where by going through the evidence a second time the Judge might come to a different conclusion [See the case of *Chunder Churn Aggrodany* v. *Looduuram Deb* (3)], or merely to enable the case to be re-argued [See the case of *Koleemooddeen Mundul* v. *Heerun Mundul* (4)]. In all these cases there was an absence of due formalities required by law. Whether the proof is according to law or not is within the jurisdiction of the Appellate Court to determine, the question of sufficiency of evidence is for the Court admitting the review. I may add here that the result of holding otherwise would be to affirm a judgment of a Judge in whose opinion it was erroneous. I, therefore, agree with the order passed by the Chief Justice.

Appeal allowed; Case remanded.

(1) 22 C. 734.

(2) 11 B. L. R. (F. B.) 423; 20 W. R. 84.

(3) 25 W. R. 324.

(4) 24 W. R. 186.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION NO. 30 OF 1904-05 OF JAUNPORE DISTRICT.

April 17, 1906.

Present:—Mr. Hardy, S. M.

BALAK AND OTHERS—APPLICANTS

versus

COLLECTOR OF JAUNPORE AS MANAGER—RESPONDENT.

Ejectment—Person occupying land—No rent paid—Occupancy rights, acquisition of—Agra Tenancy Act (II of 1901), s. 34.

In a suit for ejectment it was found that the land in dispute was held without payment of rent for a period of 26 years, twelve years out of which had expired while the old Act was in force. The status of *muafidars* was expressly disclaimed:

Held, that as there was no contract of tenancy between the parties, the tenant did not acquire occupancy rights. [p. 286, col. 1.]

Application for revision of the order of the Commissioner of Benares Division, dated the 23rd May 1905, confirming that of the Assistant Collector of Jaunpore District, in the case of ejectment.

JUDGMENT.—This is an application for revision in an ejectment case.

The applicants have held the land in dispute for a period of 26 years; they

ABDULLA ROWTHAN *v.* VASUDEVA RAVI VARMA.

have never paid rent on it and they expressly disclaim the status of *muafidars*. Respondent sued to eject them as non-occupancy tenants under section 58 (*a*). The applicants claimed right of occupancy rights from continuous possession for over 12 years. The first Court held practically that applicants had no right of occupancy tenants, inasmuch as they were not tenants at all but mere squatters on the land, and the Appellate Court confirmed this finding.

I am unable to agree with the arguments adduced by applicants. There is no evidence that any contract of tenancy existed between the parties, and had respondents attempted to obtain rent from applicants under Act XII of 1881, they would have failed to obtain a decree from the Rent Court. It was not until the Tenancy Act became law, that section 34 was enacted, that rent from such persons could be recovered in the Revenue Courts. I find, therefore, that applicants were not tenants of the land, and cannot have acquired right of occupancy rights in it: though (as has been held under the corresponding section 127 of the Oudh Rent Act) this does not bar the landholder from treating the trespassers as tenants, for the purpose of ejectment.

The application is rejected.

Application rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 164 OF 1913.

March 19, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

ANNAMALAI MAYAMMAD MEERA ROWTHAN'S SON, ABDULLA ROWTHAN —DEFENDANT NO. 1—APPELLANT

versus

THE HONOURABLE *Rajah* VASUDEVA RAVI VARMA, STYLED VALIA NAMBIDI OF VENGUNNAT, AND OTHERS —PLAINTIFF AND DEFENDANTS NOS. 2 TO 15— RESPONDENTS.

Malabar Law—Kanomdar, *right of, to claim compensation for improvements*—*Malabar Compensation for Tenants' Improvements Act* (*Mad. Act I of* 1900).

A *kanomdar* is entitled to claim compensation for conversion of jungle lands into *paramba*s, notwithstanding any provision to the contrary in the deed of mortgage. [p. 287, col. 2.]

Randupurayil Kunhisore v. *Neroth Kunhi Kannan*, 1 Ind. Cas. 207; 18 M. L. J. 98; 5 M. L. T 277; 32 M. 1; *Kochu Rabia* v. *Abdur Rahman*, 24 Ind. Cas. 106; 1 L. W. 433; 15 M. L. T. 356; 26 M. L. J. 523; *Neechooli Parie Amma* v. *Chathanadath Kallassin Kunhi Kandan*, 12 Ind. Cas. 765; (1911) 2 M. W. N. 513; 11 M. L. T. 30; 36 M. 410; 22 M. L. J. 221, followed.

A tenant is entitled to claim compensation for improvements according to the Malabar Compensation for Tenants' Improvements Act, 1900, if the the terms of the mortgage agreement are less favourable to him than the provisions of the Act. [p. 287, col. 2.]

Randupurayil Kunhisore v. *Neroth Kunhi Kannan*, 1 Ind. Cas. 207; 32 M. 1; 18 M. L. J. 98; 5 M. L. T. 277; *Kochu Rabia* v. *Abdur Rahman*, 24 Ind. Cas. 106; 1 L. W. 433; 15 M. L. T. 356; 26 M. L. J. 523, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Palghat, in Appeal Suits Nos. 913 and 914 of 1911, dated the 21st September 1912, preferred against that of the District Munsif of Alatur, in Original Suit No. 325 of 1910.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

This second appeal coming on for hearing on the 9th September, 1914, and having stood over for consideration till the 11th September 1914, the Court delivered the following

JUDGMENT.—The 1st defendant is the appellant. The suit was for redemption of a *kanom* for taking the accounts as between the mortgagor and mortgagee, including the value of improvements due to the mortgagee, and for the usual other reliefs.

The lower Appellate Court has decreed redemption and has given certain directions as to how the value of the improvements is to be calculated. The questions raised by the first defendant in this second appeal are:

(1) Whether the plaintiff could redeem that portion of the lands demised on the *kanom* of 1850 which portion is in the possession of the 1st defendant, on payment of the proportionate *kanom* amount and of the value of the improvements made on that portion by the 1st defendant;

(2) whether the 1st defendant is entitled to the value of the cost of the conversion of the jungle lands into *paramba* lands; and

(3) whether the rate of compensation to be allowed per *para* of seed-sowing lands is to be Rs. 7 per *para* as agreed upon between the mortgagor and the mortgagee under the document, Exhibit A of 1850, or whether the value should be calculated in accordance with the provisions of sections 9 to 18 of the Madras Act I of 1900, called the "Malabar Compensation for Tenants' Improvements Act."

As regards the first question, there is the distinct finding of the lower Appellate Court that the original mortgage of 1850 had been split up with the consent of both the parties and it is also stated in the lower Court's judgment that the objection was given up by the 1st defendant in the District Munsif's Court and was not argued in the lower Appellate Court.

Coming to the 2nd and 3rd questions, the lower Appellate Court construed the Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1), as deciding that in the case of contracts made prior to 1st January 1885, the right to claim compensation depends upon the terms of the contract and the rate of compensation is also governed by the terms of the contract, and not by the provisions of the Malabar Compensation for Tenants' Improvements Act. As one of the terms of the *kanom*, Exhibit A, is that the mortgagor need not pay the cost of clearing the jungle lands and converting them into *parambas*, the lower Appellate Court disallowed that cost.

The decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1), has, however, been interpreted by the later Full Bench decision [*Kochu Rabia* v. *Abdur Rahman* (2)] as not inconsistent with the decision in *Koshikot Pudiya Kovilagath Sreeman Vikraman* v. *Chundayil Madattul Anant Pattar* (3), and in *Neechooli Parie Amma* v. *Chathanadath Kallassin Kunhi Kandan* (4). In the case of *Neechooli Parie Amma* v. *Chathanadath Kallassin Kunhi Kandan* (4), it was held that where the *kanomdar* was not restrained by a contract made prior to January 1886 from making improvements, but was only restrained from claiming a right to compensation for such improvements, the *kanomdar* is entitled to claim compensation under the Act, notwithstanding the provision in the agreement. We are bound to follow the later Full Bench ruling and we hold that notwithstanding the terms of Exhibit A, the 1st defendant is entitled to claim compensation for conversion of jungle lands into *parambas*.

As regards the 3rd question, the same Full Bench ruling reported in *Kochu Rabia* v. *Abdur Rahman* (2), has held that the earlier Full Bench decision in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1). should not be construed as negativing the tenants' right to claim compensation for improvements according to the Act, if the terms of the mortgage agreement are less favourable to him as regards such right, even though the mortgage agreement was executed before 1886. Mr. C. V. Ananthakrishna Aiyar, the plaintiff's learned Vakil, argued that the opinion of the Full Bench on this point in *Kochu Rabia* v. *Abdur Rahman* (2), as to the construction of the judgment in *Randupurayil Kunhisore* v. *Neroth Kunhi Kannan* (1), was erroneous. We naturally refused to listen to this argument.

In the result, we request the Subordinate Judge to submit findings as to the compensation due to the 1st defendant for the conversion of judgle lands into *parambas* and for the conversion of lands into rice-producing fields in accordance with the provisions of the Malabar Tenants' Improvements Act.

Time three months from receipt of records and ten days for filing memorandum of objections.

In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Palghat at Calicut submitted the following

FINDINGS.—I am asked by the High Court to submit findings on the following points:—

What is the compensation due to the 1st defendant (1) for the conversion of jungle lands into *parambas*, and (2) for the conversion of lands into rice-producing fields, in accordance with the provisions of the Malabar Tenants' Improvements Act?

(1) 1 Ind. Cas. 207; 32 M. 1; 18 M. L. J. 98; 5 M. L. T. 277.

(2) 24 Ind. Cas. 106; 26 M. L. J. 523; 1 L. W. 433; 15 M. L. T. 356.

(3) 6 Ind. Cas. 887; 34 M. 61; (1910) M. W. N. 402; 8 M. L. T. 218; 20 M. L. J. 849.

(4) 12 Ind. Cas. 765; 36 M. 410; (1911) 2 M. W. N. 513; 11 M. L. T. 30.

1*st point*. There is no evidence that the *parambas* yield any income. Apparently they do not yield, because they are in the course of reclamation into paddy fields. Jungle must be first removed, then there must be levelling and putting up of ridges by removing the roots of trees, but only the first portion of the work has been done, and the rest remains to be done. So, there will be no yield now. The 1st defendant is, therefore, entitled only to the costs of clearing the jungle under section 11 of the Act. There were two Commissions in this case, and both Commissioners agree that the costs will be Rs. 318-11-3.

3. I find that the 1st defendant is entitled to Rs. 318-11-3 on this head.

4. 2*nd point*. In deciding this point there are three things to be considered and they are (*a*) extent of lands, (*b*) the rent of the lands, and (*c*) the price of paddy, and I shall consider each head separately.

5. (*a*) I have already found the extent in pargraph 11 of my previous judgment, because it was upon the extent that I calculated the value of improvements at so much per *para*. The extent is 283-1/4 *paras* approximately.

6. According to survey measurements, 10 *paras* make one acre, and so there are about 28 and odd acres now. At the time of survey, the extent was 25 acres. So there is an excess of 3 odd acres now, or about 33 odd *paras*.

7. Out of 25 acres which existed at the time of Settlement, 15 was double crop and 10 single crop, as we see from the Settlement register. It is admitted by 1st defendant that he has not done anything for those lands since then. All the lands except plots L series are old lands, and yet the 1st defendant says that all of them except G series are double crop lands. This cannot be true. The extent of G series is only $16\frac{3}{4}$ *paras*, a little over $1\frac{1}{2}$ acres only, whereas we found that there were 10 acres of single crop lands. So, it is clear that many of the plots claimed by 1st defendant to be double crop are only single crop lands, and the Commissioners have found so in respect of several plots by actual observation. With regard to some other plots, the Commissioners have not expressed an opinion. However, it is certain that the extent of old single crop lands is at least 10 acres or 100 *paras*, and not 16 odd *paras* as contended by 1st defendant.

8. The Commissioners have made their calculation on the supposition that the 1st defendant will prove his assertion. They have taken all the lands pointed out by 1st defendant as double crop, and on that supposition they have prepared the account. So, they have made a mistake as to the rent also. For double crop lands they have calculated rent at 6-fold or so, and for single crop lands at 3-fold or so, and in that way they have arrived at the rent, but if the extent of double crop lands is less, there must be a diminution of rent also. For 150 *paras* of double crop the rent will be 900 *paras* of paddy, and for 100 *paras* of single crop the rent will be 300 *paras*, and thus the total will be 1200 *paras*, and this is the rent we find in Exhibit R. So, the rent of old lands is only 1200 *paras*.

9. I find that the extent of double crop lands is about 150 *paras*, and that of single crop lands 133 odd (including the new lands). Total is already found by me.

10. (*b*) In considering the first point, I have already said that the rent of old lands is only 1200 *paras*. The rent of new lands is only 93 odd as found by the Munsif.

11. I find, therefore, that the total rent is only 1293 *paras* and $1\frac{1}{2}$ *danglies*.

12. (*c*) As to the price, the Munsif says that he caused the Commissioners to make experiments and thus arrived at the figure according to the Government notification which was then in force. They, therefore, found that the price was 2 *paras* 6 *danglies* $2\frac{3}{4}$ *nazhies* a rupee. According to the latest notification dated 16th June 1914, the rate is 21·69 *danglies* per rupee, and this will come to about the figure arrived at by the Commissioners by actual experiment.

13. I find, therefore, that the price must be calculated at 2 *paras* 6 *danglies* 2-3/4 *nazhies* per rupee.

14. It follows, therefore, that the value of reclamation will come to Rs. 4,492-14-0, and I find accordingly.

15. It must be stated here that the plaintiff's Vakil argued that the *jenmi's* rent must be deducted along with revenue and cultivation expenses, but there is no provision

in the Act for such deduction, and it has not been usual to make such deduction till now. I disallow this contention. And it does not seem to have been taken in the lower Court.

16. Then, it was argued that the cost of *eries* and tanks must be taken as a part of the cost of making the reclamation and that the *eries* and tanks should not be separately paid for, in addition to the value of reclamation. The Act says that *eries* and tanks will be improvements. Further, there is no evidence that the crop can be raised only with the help of the *eries* and tanks. Sometimes these may be necessary, and at other times the rain water alone may be sufficient. There is no evidence on the point, apparently because the same was not taken in the lower Court. This is a new point raised here, and as it depends on evidence which is not on record, it cannot be allowed.

17. My finding is that on both heads together the 1st defendant is entitled to Rs. 4,811-9-3.

18. It may also be mentioned here that the 1st defendant purchased the property for Rs. 3,880 only, and after that he has made only about 93 odd *paras* of single crop lands and some *parambas*, and he is now getting more than Rs. 8,300.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding. We modify the decree of the lower Appellate Court by allowing to the 1st defendant Rs. 4,811-9-3 for improvements (on account of reclamation) in substitution of the amount of Rs. 1,983-1-7 awarded by the decree of that Court.

The plaintiff-respondent will pay the appellant-1st defendant's costs in this second appeal.

Time for redemption will be extended to six months from to date.

Decree modified.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 323 OF 1914.

May 3, 1915.

Present:—Mr. Justice Piggott.

RAM NARAIN—JUDGMENT-DEBTOR—APPELLANT

versus

GOBIND PERSHAD—DECREE-HOLDER—RESPONDENT.

Mortgage—Redemption decree—Time fixed for payment of money—Appellate Court extending time and fixing another date, effect of—Interest.

In a redemption suit a certain date was fixed in the decree for payment of the money and it was provided that up to that date the mortgagor would pay interest at the contractual rate. The plaintiff appealed to the High Court. The High Court confirmed the decision of the Court below and, extending the period for payment of the money, fixed another date:

Held, that the effect of the extension of time by the Appellate Court was to substitute the date fixed by that Court for that fixed by the first Court, and that the mortgagee was entitled to interest at the contract rate up to the date fixed by the Appellate Court. [p. 290, col. 2.]

Execution first appeal from the decision of the Additional Subordinate Judge of Cawnpore, dated the 28th February 1914.

The Hon'ble Mr. *Moti Lal Nehru*, for the Appellant.

Mr. *R. K. Malviya*, for the Respondent.

JUDGMENT.—This is an execution first appeal, and the question raised by it is as to the interpretation of a conditional decree for redemption, dated the 13th of January 1908, and the effect of an order and decree of this Court, dated August 1st, 1910, disposing of an appeal from the said decree. It is necessary, first of all, to be quite sure what interpretation it would have been necessary to put on the decree of the first Court if it had never been modified in any way by this Court. The suit was for redemption of four mortgages and the mortgagee was in possession of the property. He was entitled under the terms of his mortgages to compound interest at Re. 1 per cent. per mensem, with six-monthly rests, but was also liable to account for the profits of the mortgaged property in his hands. A reference to the judgment of the first Court makes it clear that the intention of that Court was simply to give effect to the mutual rights and liabilities of the parties under their contract of mortgage up to the 13th of June 1908, the date

fixed for payment. The decree was unfortunately worded. In referring to the profits of the mortgagee in possession the words used in the decree were as follows:— "The defendant shall be entitled to get any further sums that may be found due to him with reference to the actual realizations up to the date of payment, together with interest at the contractual rate at Rs. 1 per cent. per mensem." I must lay stress on the fact that these words, as they stand, are scarcely susceptible of any reasonable interpretation. Either the word "defendant" has been used by an oversight for the word "plaintiff", or the words "entitled to get" have been used when the Court intended to say "liable to account for." It is because of the ambiguous and unsatisfactory wording of this paragraph of the decree that I felt justified in referring to the operative portion of the judgment in order to arrive at the mind of the Court. Reading the decree and the judgement together, I have no real doubt as to what the first Court intended to do, and must be understood to have done. The date fixed for payment was the 13th of June 1908. Up to that date the defendant-mortgagee was to be entitled to receive interest at the contractual rate, namely, one per cent. per mensem, compound interest, with six-monthly rests, but on the other hand he was to be liable to account for profits received by him by virtue of his possession over the mortgaged property, these profits being deducted from interest. After the 13th June 1908, in place of the right to receive the contract rate of interest and liability to account for the profits received, the Court allowed the defendant mortgagee simple interest at eight annas per cent. per mensem. I have no doubt that the Court of first instance did not intend that either the right to receive interest at the contract rate, or the laibility to render account for rents or profits, should continue beyond the 13th June 1908; nor do I find anything in the decree which, in my opinion, requires to be interpreted as extending either this right or this liability beyond the date fixed for payment. Now comes the other question, as to the effect of this Court's decree of August 1st 1910. The appeal before this Court was by the plaintiffs-mortgagors. That appeal was dismissed and the decree of the first Court affirmed; but the time for payment was extended to a period of six months from the date of this Court's decree, that is to say, to the 1st of February 1911. In my opinion the effect of this extension must be considered to be a substitution of this date, namely, the 1st of February 1911, for the 13th June 1908 in the decree of the first Court. The defendant-mortgagee will be entitled to interest at the contract rate upto the extended date thus fixed for payment and will be liable to account for the profits received and enjoyed by him up to that date. Beyond that period his right and liability will both cease, and in lieu of either he will retain the right to receive simple interest at eight annas per cent. per mensem. This is the principle on which the Court below has proceeded in preparing the decree absolute for sale, which has followed on the failure of the plaintiffs-mortgagors to avail themselves of the opportunity to redeem the property within the period fixed. The appeal, therefore, fails and is dismissed with costs, including fees on the higher scale. For the purpose of proper calculation of fees the appeal will be valued at Rs. 7,000.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

November 2, 1914.

Present:—Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

DHIRAJ CHANDRA BOSE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Srimati HARI DASI DEBI AND ANOTHER—PLAINTIFFS—RESPONDENTS

Bengal Land Revenue Sales Act (XI of 1859), ss. 5, 6, 33—Embankment charges, sale for, whether sale for land revenue—Collector, jurisdiction of.

A sale of an estate for arrears of embankment charges (*pulbandi*) is not a sale for arrears of land revenue, and it is not competent to a Collector to hold such a sale under Act XI of 1859.

Appeal heard *ex parte* from a judgment and decree of the High Court, dated July 4th, 1911,

reported as 7 Ind. Cas. 43, reversing a judgment and decree of the Subordinate Judge of Midnapore, dated March 29th, 1909.

FACTS of the case appear fully from the judgment of the High Court reported in 7 Ind. Cas. 43.

Mr. *Dunne*, for the Appellants, contended that the sale for arrears under Act XI of 1859 could not be set aside. The respondent had fallen into arrears and notices, dated February 16th, 1907, were duly issued under sections 6 and 13 of the Act of 1859 fixing the date of sale as March 26th. These notices were duly served under section 7 upon the *ryots* and other tenants not to pay rents to the respondent. On March 13th, 1907, a further certificate for Rs. 69-13-9 was filed in the Collectorate under Act II of 1882 for embankment charges. On March 25th, 1907, she presented a petition to the Collector for exemption of the shares in question from sale. The Collector made the order in favour of the respondent. The order was made under section 18 of Act XI of 1859, which provides that the Collector should duly record in a proceeding the reason for granting such exemption. It was a preliminary proceeding, constituting a *sine qua non* to an order for exemption being made. Under section 6 the sale was to be to the highest bidder and no payment or tender for payment made after the latest date for payment should bar or interfere with the sale either at the sale or after its conclusion. The sale took place without an order for exemption being made. On March 25th, the respondents' agent deposited Rs. 807 in respect of the various dues, which was short by Rs. 69-13-9 of the full amount required to be paid. On March 26th the matter came before the Collector, who, on the deficit being reported to him, directed that the sale must proceed. The respondent appealed to the Commissioner under section 26. The appeal was dismissed on July 26th, 1907, and the sale became final and conclusive under the Act XI of 1859, section 27, and the sale certificate granted to the purchaser under section 28. The respondent had established no irregularity in connection with the sale or one by reason of which she sustained some substantial injury. The Court had no jurisdiction under section 33 to annul the sale. The failure to deposit the arrears due was a matter for which she and her agent were entirely responsible.

[MR. AMEER ALI referred to section 3 of Act XI of 1859.]

[LORD DUNEDIN: Does the notice specify the day when money is to be paid?]

In case of arrears of revenue it took the form of sale; in other cases it was a kind of decree enforceable along with other debts.

[MR. AMEER ALI: The Collector allowed the arrears to be paid; section 18 must be read with other sections.]

[LORD SHAW: The Collector has power to grant exemption.]

[LORD DUNEDIN referred to section 33.]

[LORD SHAW: Section 33 is for arrears of revenue.]

The whole point was whether it was a sale for arrears of revenue under certificate.

[LORD DUNEDIN: If you bring it under section 33, it is hopeless. If you could show that it was a sale under section 5, the thing would be unimpeachable.]

[LORD SHAW: It must be a sale for arrears of the Government revenue. It does not include anything else. If at the time of sale, there is no arrear of revenue, the sale would be invalid. No honest Government could act in any other way.]

[MR. AMEER ALI: It is the act of the Collector whose duty it is to inform the public of the arrears.]

The Respondents did not appear.

JUDGMENT.

LORD DUNEDIN.—This is an appeal heard *ex parte*, and whenever this is the case it is a matter of considerable anxiety to the Board. But in this appeal that anxiety was certainly relieved by the exceedingly fair and candid way in which it was presented by the learned Counsel for the appellants. In the result, upon a full consideration of the circumstances, their Lodrships see no reason for interfering with the judgment of the Court below.

They will, therefore, humbly advise His Majesty to dismiss the appeal.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 665 OF 1914.

April 27, 1915.

Present:—Mr. Justice Piggott.

AMIR SHAH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

TULA PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Endowed property—Mortgagee from trustee—Limitation—Limitation Act (IX of 1908), s. 10, Sch. I, Art. 134—Limitation Act (IX of 1871), s. 10.

A suit for possession of an endowed property against a person who has been holding it as a mortgagee from the trustees of the property for over 12 years, prior to the coming into force of the Limitation Act IX of 1871, on the ground that the alienation was null and void, is barred by limitation. [p. 293, col. 1.]

Jagamba Goswami v. *Ramachandra Goswami*, 31 C. 314, followed.

Behari Lal v. *Muhammad Muttuki*, 20 A. 482; A. W. N. (1898) 123, referred to.

Second appeal from the decision of the Subordinate Judge of Ghazipur, dated the 25th of February 1914.

FACTS.—The plaintiffs, alleging themselves to be trustees of a certain shrine, brought a suit for cancellation of two mortgages executed by a former *mutwalli* on *Jeth Sudi* 10th, 1260 *Fasli* and *Magh Sudi* 2nd 1265 *Fasli* respectively, and for possession on the ground that the property mortgaged was *waqf* property. The main plea in defence was that the suit was barred by limitation. The Court of first instance held in favour of the plaintiff and found that the mortgages were without consideration and, therefore, section 10 read with Article 134 of the Limitation Act applied. On appeal the lower Appellate Court dismissed the suit, on the ground that the time began to run against the trustees when the mortgagee took possession of the property. It relied on *Behari Lal* v. *Muhammad Muttuki* (1). The plaintiffs appealed.

Mr. *Muhammad Ishaq Khan*, for the Appellants:—The Court of first instance has found in clear and express terms that the mortgages were without consideration and the lower Appellate Court is wrong in dismissing the suit without finding that the bonds were without consideration. No suit, having regard to the possession of section 10 and Article 134 of the Limitation Act, against the assign of a trustee is barred by limitation if the transfer is not supported by valuable consideration.

Mr. *Lakshmi Narayan*, for the respondants:—There are two points to be considered in this case. The *first* is whether the question of consideration can be raised now. There was no issue fixed in the Court of first instance as regards consideration. Moreover, the transferee having been in peaceable possession of the property for over fifty years, the plaintiffs, who are no parties to the transaction, cannot raise the question of consideration when they practically admit the execution of the bonds.

The other question is whether the suit is barred by limitation. The mortgages were executed in the years 1853 and 1858 and they were already barred by 12 years' rule of limitation prior to the coming into force of the Limitation Act of 1871. Section 10 of that Act is in effect the same as section 10 of the present Act and these Acts can have no retrospective effect.

He relied on *Jagamba Goswami* v. *Ramachandra Goswami* (2).

Mr. *Ishaq Khan*, in reply cited *Jewun Dass Sahoo* v. *Shah Kubeerood Deen* (3), *Shaikh Laul Mahomed* v. *Lalla Brij Kishore* (4).

JUDGMENT.—The question raised by this second appeal is whether the lower Appellate Court was justified in dismissing the suit brought by the plaintiffs-appellants now before me, on the ground that it was barred by limitation: stated somewhat more strictly, the precise point is whether the lower Appellate Court was justified in so dismissing the suit, without formally recording a certain finding of fact which, it is contended, has not been recorded. The plaint as filed was somewhat curiously drafted. The land in suit was stated to be revenue-free land appertaining to a certain *waqf* created in favour of a shrine, known as the shrine of Hazrat Shah Nandpir in the Ghazipur District. The plaintiffs claimed to be the trustees of the said shrine. They impleaded three defendants, though the allegations in their plaint are entirely directed against Tula Pande, defendant No. 1. There is no explana-

(1) 20 A. 482; A. W. N. (1898) 123.

(2) 31 C. 314.

(3) 2 M. I. A. 390; 6 W. R. 3 (P. C.); 7 Suth P. C. J. 100; 1 Sar. P. C. J. 206; 18 E. R. 248.

(4) 17 W. R. 430.

tion of the appearance of the defendants Nos. 2 and 3 on the record, beyond the remark that they have been impleaded as *pro forma* defendants. I may add that they are not impleaded in the 2nd appeal now before me. With regard to the defendant Tula, it is alleged that he was the tenant of the land specified in the plaint; but that he had succeeded without the plaintiffs' knowledge in getting himself recorded in the village papers as being in possession of a 3/5th share in the said land as mortgagee. It was said that there was no *asliat*, reality or substance, in the alleged mortgage. It was further stated that these facts came to the knowledge of the plaintiffs when they sued the said Tula for arrears of rent. Tula pleaded the mortgage and eventually, the decision was in his favour as regards the 3/5th share of which he claimed to be the mortgagee. The date of the decision of the Revenue Court against the plaintiffs on this point, namely, the 26th November 1911, was stated as the date of the origin of the cause of action. In the last paragraph of the plaint, while specifying the reliefs sought, the plaintiffs for the first time admitted in a casual sort of way that they were aware that the defandant Tula was claiming to hold under two mortgage-deeds of specified dates. The decree asked for is one for recovery of possession, on the ground that the land specified at the foot of the plaint is *muafi* land forming part of an endowment in favour of the shrine of Hazrat Shah Nandpir, which no one was entitled to mortgage, sell, or transfer in any other way. Then follows the specification of two mortgage-deeds alleged to be in themselves null and and void, and a prayer that they may be declared to be so. The dates of the mortgage-deeds are given according to the *Fasli* era. The earlier of the two is dated sometime in the year 1853 or 1854 A. D. while the date of the latter, which is the more important for the purpose now before me, corresponds with 5th February 1859. The lower Appellate Court has recorded a finding that the persons who were, on the dates borne by these deeds, the trustees or managers of the shrine executed the mortgages in question in favour of Tula Pande, who thus became the mortgagee of a 3/5ths hare in the land in suit, the whole of which had been his occupancy holding.

That Court also points out that the defendant's status as mortgagee to this extent was recognized at the Settlement of 1884 A.-D., and that in the years 1866 and 1890 attempts to claim from him the rent of the land in suit had been defeated to the extent of the 3/5th share held on mortgage, upon the defendant's setting up the mortgages in question. The Court below holds it clearly proved that from the year 1866 onward, if not earlier, the defendant has been successfully asserting against the managers of the shrine his right to hold possession under the mortgages now called in question. On these findings the learned Subordinate Judge has dismissed the suit as barred by the 12 years' rule of limitation, whether Article 134 or Article 144 of Schedule I to the Indian Limitation Act, No. IX of 1908, be applied. He supports himself by the decision of a Full Bench of this Court in *Behari Lal* v. *Muhammad Muttuki* (1). It is contended before me that the Court of first instance had recorded a finding to the effect that the defendant Tula had failed to prove that the mortgages in question were for valuable consideration, and that the lower Appellate Court should not have dismissed the suit without expressly reversing that finding. I have pointed out already the form in which the plaint was drawn up. The mortgage or mortgages under which the defendant Tula claimed to hold were indeed assailed as null and void, but the only reason put forward was that the property said to be mortgaged was trust property and so inalienable. The plaintiffs avoided mentioning the particular mortgage-deeds which they desired to assail until the very end of their plaint, and even then never suggested that the person or persons who had executed these mortgages had received no consideration. The point was not raised by the pleadings and the defendant was not put to proof of the passing of consideration, even supposing that he could be expected, after the lapse of 50 or 60 years, to produce any evidence on the question of consideration other than the recital in the deeds themselves. The decision of the lower Appellate Court proceeds on the assumption that there was an actual contract of mortgage between the trustees of the endowment on one side and the defendant Tula on the other, that

is to say, an actual transfer by way of mortgage which could only be called in question on the ground of the limited rights of the transferor in the property purporting to be dealt with. I think this is a reasonable view of the case on the facts as stated in the judgment of the lower Appellate Court. Apart from this, the decision of that Court has been supported before me on another ground. What the appellants now before me say is that, in the absence of an express finding that Tula was an assignee for valuable consideration from the then trustees of the *waqf*, the case is covered and limitation saved by the provisions of section 10 of the Indian Limitation Act, No. IX of 1908. The principle laid down by that section was introduced for the first time in the Limitation Act No. IX of 1871 which came into force on the 1st of July 1871. The later of the two mortgage-deeds now sought to be attacked bears a date more than 12 years prior to the coming into force of the Act above mentioned. According to the principle laid down in *Jagamba Goswami* v. *Ramachandra Goswami* (2), the present suit would in any case be barred by the fact that Tula had been in possession, holding as mortgagee from the trustees of the endowed property, for 12 full years and more, prior to the coming into force of the Limitation Act of 1871. On these grounds I hold that this appeal fails and I dismiss it with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 174 OF 1914.

March 9, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

THIRUVENKATACHARIAR—AUCTION-PURCHASER—APPELLANT

versus

THANGAYI AMMAL AND ANOTHER—PETITIONER AND INSOLVENT—RESPONDENTS.

Provincial Insolvency Act (III of 1907), *ss.* 20, 22—*Sale held by Receiver—Conditions of sale changed just before sale—Application to Court by creditor to set aside sale—Power of Court to set aside sale—'Person aggrieved,' meaning of.*

An Official Receiver, in whom the property of an insolvent vested under an order of adjudication, issued a proclamation for sale of certain properties, subject to two mortgages subsisting thereon. On the date fixed for the sale he varied the sale proclamation by noting that the properties would be sold free of the mortgages, and sold the properties accordingly. The respondent, a creditor of the insolvent, put in an application to the District Court to set aside the sale, on the ground that the action of the Receiver in varying the sale proclamation was irregular and that by reason of the irregularity the properties had fetched a very low price:

Held, that the Court had jurisdiction to set aside the sale inasmuch as under section 22 of the Provincial Insolvency Act it had an unfettered discretion to set aside any order passed by an Official Receiver. [p. 296, col. 1.]

Bhukhandas Lallubhai, In re, 7 Bom. L. R. 954; *Woonwalla & Co.* v. *Macleod*, 30 B. 515; 8 Bom. L. R. 40, referred to.

Though a Court does not ordinarily interfere with an order passed by a Receiver in the exercise of his discretion, it will do so where proper reasons are shown that the action of the Receiver was irregular and has prejudiced the interests of the creditors. [p. 296, cols. 1 & 2.]

Lloyd, Ex parte, Peters, In re, 47 L. T. 64, referred to.

Any person who is entitled to demand a decision of the Court in respect of the property of an insolvent and would be damnified if the decision goes against him, is a person aggrieved within the meaning of section 22 of the Insolvency Act. [p. 297, col. 1.]

In re Lamb, Ex parte Board of Trade, (1894) 2 Q. B. 805; 64 L. J. Q. B. 71; 9 R. 636; 71 L. T. 12; 1 Manson, 373; *Ex parte, Official Receiver, In re Reed*, 19 Q. B. D. 174; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 660; 4 Morrell, 225, followed.

Hanseswar Ghosh v. *Rakhal Das*, 20 Ind. Cas. 683; 18 C. L. J. 359; 18 C. W. N. 366; *Ex parte Sidebotham; In re Sidebotham*, (1879) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715, distinguished.

In re Langtry, Ex parte Stevenson, (1894) 63 L. J. Q. B. 570; 70 L. T. 736; 10 R. 220; 42 W. R. 496; 1 Manson, 169, referred to.

Appeal against an order of the District Court of Tanjore, in Insolvency Appeal No. 168 of 1914, in Insolvency Petition No. 13 of 1913 (in Insolvency Petition No. 90 of 1910 on the file of the Official Receiver's Court, Tanjore.)

FACTS.—This is an appeal by the auction-purchaser against the order of the District Judge of Tanjore, setting aside the sale by the Official Receiver of certain properties of the insolvent. The properties were first advertised for sale subject to encumbrances. On the date of sale he sold it free of encumbrances. Under section 22 of the Insolvency Act, one of the creditors applied to the District Court to set aside the sale on the ground

that the property would have fetched a larger price. The sale was set aside. The appeal is against that order.

Mr. *T. Rangachariar*, instructed by Mr. *R. Rangachariar*, for the Appellant, contended that the District Court had no jurisdiction to set aside the sale, on the ground that section 20 of the Insolvency Act was controlled by section 22 of the same Act, *viz.*, that the Official Receiver had absolute power to sell the property: *Woonwalla & Co.* v. *Macleod* (1). Once the Official Receiver acted *bona fide* in the matter, the District Court had no jurisdiction: *Lloyd, Ex parte, Peters, In re* (2).

Mr. *R. Kuppuswami Aiyar*, appeared for the Respondents and argued *contra*.

JUDGMENT.—The Official Receiver of Tanjore, in whom the property belonging to the insolvent vested under an adjudication order, issued a proclamation for the sale of the properties in dispute. In it he stated that the properties would be sold subject to two mortgages subsisting in favour of certain secured creditors. The sale was fixed for the 21st March 1914. On that day the Official Receiver noted in the sale proclamation, "Intending bidders present say that the properties would fetch a better price if they are sold free of mortgage . . . . . Under these circumstances in modification of the terms of the sale proclamation, I propose to sell now the properties free of encumbrance." The properties were purchased by the appellant for Rs. 22,000. This was on the 22nd March. On the 9th of April an application was made to the District Court by the respondent, who is also one of the creditors of the insolvent, for setting aside the sale on the ground that the variation in the sale proclamation was irregular, that if the properties had been advertised to be sold free of encumbrance, a larger number of bidders would have been present, that she was prejudiced by this action of the Official Receiver in directing the sale at the last moment free of encumbrance, and that there was an offer of Rs. 25,000 for the property. For the above reasons she prayed that the sale be set aside and that a fresh auction be held in respect of the properties. The District Judge was of opinion that the procedure adopted by the Official Receiver was irregular and that there was good ground for the allegation that the creditors were prejudiced by the variation in the proclamation of sale, and set aside the sale. In appeal Mr. Rangachariar raises three objections to the order of the District Judge. In the *first* place he argues that the District Judge had no jurisdiction to set aside the sale held by the Official Receiver. He draws attention to section 20 of the Provincial Insolvency Act, which gives the Receiver full discretion to sell property and to grant receipts by clauses (*a*) and (*b*), but which restricts the powers of the Official Receiver in regard to other matters in the subsequent clauses by directing that he should obtain the sanction of the Court. Clauses (*a*) and (*b*) of section 20 correspond in a general way to section 50 of the Bankruptcy Act, whereas clause (*c*) downwards have been adopted from section 57. Both these sections are subject to the general power of supervision retained by the Courts in England under section 90 of the same Act. Section 22 of our Act has a similar provision. Whereas clauses (*a*) and (*b*) of section 20 contemplate the exercise of ordinary powers which are incidental to the management of an insolvent's property, clause (*c*) onwards refer to the dealings with the insolvent's property which are calculated to throw an onerous obligation on the estate itself. It is for that reason that the previous sanction of the Court is considered necessary before the Receiver is allowed to exercise those powers. In either case, whether a power is exercised without obtaining the sanction of the Court or after obtaining its sanction, the general superintendence possessed by the Court to correct irregularities committed by an officer of the Court is not affected. Mr. Rangachariar contends that the decision of the Receiver acting under clause (*a*) is not controllable by the Court. We are unable to agree with this contention. The first clause of section 20 says: "Subject to the provisions of the Act the Receiver" shall do certain things and when we come to section 22, we see that liberty is given to "any person aggrieved by any act or decision of the Receiver to apply to the Court which may confirm, reverse or modify any act or decision complained of." It is true, as pointed

(1) 30 B. 515; 8 Bom. L. R. 49.
(2) 47 L. T. 64.

out by Mr. Rangachariar, that section 31 of the Indian Insolvency Act of 1848, prior to its amendment and consolidation with the Presidency Towns Insolvency Act of 1909, was held by the Bombay High Court in *Bhukhandas Lallubhai, In re* (3), not to enable the Court to interfere with a sale made by the Official Assignee. In that section the same unlimited power of interference which is given by section 22 of the Provincial Insolvency Act, is not to be found. But nonetheless it seems to us that even under section 31 of the Indian Insolvency Act, it was open to the Court to entertain application against a sale held by the Official Assignee if it was irregular and unauthorised. In *Woonwalla & Co.* v. *Macleod* (1), the final decision is made to rest upon the ground that the Court is not bound to interfere because it is discretionary to do so. It may be open to question whether this decision should be followed in cases arising under the Presidency Towns Insolvency Act as it stood prior to its amendment. But we have no hesitation in holding that the language of section 22 of the Provincial Insolvency Act is clear and unambiguous and gives unfettered discretion to the Court to set aside the order passed by the Official Receiver.

The *second* objection relates to the undesirability of overruling the Official Receiver in matters which are within his competency. The District Judge points out that the change in the conditions of the proclamation without giving sufficient notice of it had the effect of preventing intending bidders from coming forward. An affidavit was filed in the Court below by the respondent's agent, which says that one Srinivasa Iyer had offered to purchase the property for Rs. 25,000 and the said intending purchaser had already made a deposit of 25 per cent. of the purchase-money with the Receiver. Under these circumstances we cannot say that the District Judge on the materials before him did not exercise his discretion properly. In *Lloyd, Ex parte; Peters, In re* (2), all that was held was that discretion of a trustee will not be interfered with unless it is shown that he has acted "as no reasonable man would." It is not an authority for the proposition that where proper reasons are given by a Court for holding that the action of the Receiver was irregular and has prejudiced the general interests of the creditors, it should not set aside the order passed by the Receiver.

The *third* objection of Mr. Rangachariar is that the petitioning creditor, the respondent, is not an aggrieved party under section 22 of the Provincial Insolvency Act. He relies upon a judgment of the Calcutta High Court reported in *Hanseswar Ghosh* v. *Rakhal Das Ghose* (4). In that case a stranger, not a creditor, who had been injuriously affected by the procedure adopted by the Official Receiver was held not to come under the designation of "persons aggrieved." Mookerjee, J., quotes the language of James, L. J., in *Ex parte Sidebotham, In re Sidebotham* (5) and points out that a third party has his remedy by way of suit, and that no act of the Receiver can conclude his title; he came to the conclusion that he was not a person aggrieved under the Insolvency Act. In the present case the respondent is a creditor and the fact that she happens to be an unsecured creditor, is a point in her favour. It was pointed out in *In re Langtry, Ex parte Stevenson* (6), that a creditor, though he had not tendered his proof at the date of the order, was a person aggrieved with reference to a scheme of arrangement which injuriously affected the rights of creditors. *In re Lamb, Ex parte Board of Trade* (7), Lord Esher points out that any person who is brought before the Court to submit to a decision is, if the decision goes against him, a person aggrieved; and he refers to his own decision in *Ex parte Official Receiver, In re Reed* (8), where he explains the language of James, L. J., in *Ex parte Sidebotham, In re Sidebotham* (5), as meaning a man against whom a decision has been pronounced which has wrongfully refused him something which he had a right to demand.

(3) 7 Bom. L. R. 974.

(4) 20 Ind. Cas. 683; 18 C. L. J. 359; 18 C. W. N. 366.

(5) (1879) 14 Ch. D. 458; 49 L. J. Bk. 41; 42 L. T. 783; 28 W. R. 715.

(6) (1894) 63 L. J. Q. B. 570; 70 L. T. 736; 10 R. 220; 42 W. R. 496; 1 Manson, 169.

(7) (1894) 2 Q. B. 805; 64 L. J. Q. B. 71; 9 R. 636; 71 L. T. 12; 1 Manson, 373.

(8) 19 Q. B. D. 174; 56 L. J. Q. B. 447; 56 L. T. 876; 35 W. R. 660; 4 Morrell, 225.

In the case before us, the creditor is entitled to a decision in respect of the sale of the property of the insolvent, and she is certainly a person who would be damnified if the decision goes against her. Therefore, in the language of Lord Esher, she is a person aggrieved. We must hold for these reasons that the decision of the District Judge is right and that this appeal should be dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 5 OF 1905-06

OF LUCKNOW DISTRICT.

March 15, 1906.

Present:—Mr. Hardy, S. M.

GAJRAJ SINGH—PLAINTIFF—APPELLANT

versus

Maharaja UDEY PARTAB NARAIN SINGH—DEFENDANT--RESPONDENT.

Ejectment, suit for, by lambardar—*Other co-sharers no parties—Co-sharers making separate collections*—Lambardar, *rights of, to eject* qua lambardar—*Oudh Rent Act* (*XXII of* 1886), *ss.* 108 (8), 126 (1).

A *lambardar*, though he does not make the entire collections of the village, is entitled to maintain a suit for the ejectment of a tenant, the consent or dissent of other co-sharers being immaterial. Section 126 (1) of the Oudh Rent Act is no bar to such a suit. A share-holder objecting to his action has his remedy to apply for his removal and to partition his share. [p. 298, col. 1.]

Second appeal from an order of the Commissioner of the Lucknow Division, dated the 24th August 1905, reversing that of the Assistant Collector of Lucknow District, in a case of ejectment.

JUDGMENT.--This is a second appeal in a suit contesting a notice of ejectment under section 108 (8), Oudh Rent Act. The decision in the present case will govern two connected cases.

The notice of ejectment was issued by the Maharaja of Ajudhia who is superior proprietor of the village. He also holds 15/16ths of the under-proprietory right, Nageshar Baksh being the co-sharer of the remaining 1/16th share. The Maharaja is the *lambardar* and the evidence goes to show that he has granted leases to and ejected tenants, though the cases of ejectment have not been numerous. He collects rent according to his share, the co-sharer also collecting to the extent of his 1/16th share. It does not appear whether the right of the co-sharer to collect his *quota* of rent is based on custom. The *wajjb-ul-arz* is silent on the subject and it is probable that the arrangement suits the convenience of the co-sharers. But Nageshar objects to the tenant, the present appellant, being ejected and the question arises whether the *lambardar*-respondent is entitled to eject the tenant against the wish of the co-sharer.

The Assistant Collector held that under section 126 (3) of the Oudh Rent Act no custom had been proved, and that the settlement *wajib-ul-arz* did not confer on the *lambardar* the right of ejectment. He, therefore, set aside the notice.

The Commissioner held a different view. He pointed out that "collection of rent can be divided but ejectments cannot, and the fact that the co-sharer collected his *quota* of rent did not bar ejectment by the *lambardar*. The usal rule is that the *lambardar* is entitled to eject [section 126 (2), Oudh Rent Act] and it is for those who allege the contrary to prove it." There being no rebutting evidence, the Commissioner held that the *lambardar* was entitled to eject, though the evidence as to custom was not very full.

In appeal it is urged that no custom has been proved authorising the *lambardar* to eject and that the decision contravenes section 126 of the Act.

It must be admitted that evidence to prove custom, *i.e.*, that it is ancient, reasonable and certain, is not forthcoming; such evidence as there is shows that the *lambardar* has exercised powers of ejectment in the past. It remains to be decided whether the terms of section 126 (1) preclude the *lambardar* from ejecting. The section does not define the powers of a *lambardar*. It merely says that a sharer in an under-proprietary tenure in which a division of land has not been made among the sharers, shall not sue for arrears, enhance or eject except through a Manager authorised to collect rents on behalf of all the sharers. Its object was to prevent suits for arrears being brought against tenants by numerous co-sharers, and it is not a

compendium of the duties of the *lambardar* who holds his position by Statute and who "exercises his powers independently of the co-sharers, their consent or dissent 'being' immaterial." By general custom arising from the necessity of the case the *lambardar* is entitled to eject, enhance or sue for arrears of rent, a shareholder objecting to to his action being able to apply for his removal or to partition his share. The fact that in this particular case a co-sharer separately collects rent to the extent of his share does not weaken the authority of the *lambardar* in matters like enhancement or ejectment, which must be effected by the representative of the co-sharers though his authority to collect the co-sharer's *quota* of rent is probably for purposes of convenience in abeyance. The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

March 15, 1915.

Present:—Lord Dunedin, Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.

V. VENKATANARAYANA PILLAY, DECEASED—PLAINTIFF—APPELLANT

versus

V. SUBBAMMAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Suit by presumptive reversioner to set aside adoption—Death of plaintiff—Right of next presumable reversioner to continue suit—Suits to impugn validity of transactions by Hindu females—Plaintiff in such suits represents all reversioners—Right of contingent reversioners to join as plaintiffs—Abatement of suit—Substitution—Limitation Act (IX of 1908), Sch. I, Arts. 118, 125, *distinction between—Civil Procedure Code* (*Act V of* 1908), *O. I, r.* 1.

A suit brought by a presumptive reversioner for a declaration that an alleged adoption is invalid is brought by him in a representative capacity and on behalf of all the reversioners, and on the death, therefore, of the presumptive reversioner the next presumable reversioner is entitled to continue the action begun by the deceased plaintiff. [p. 300, col. 1; p. 302, col. 1.]

The two classes of cases covered by Article 118 and Article 125 of Schedule I of the Indian Limitation Act (IX of 1908) are distinct in their scope and character and differ widely in their language. The former Article relates to status and involves the adjudication of a right *in rem*, and the latter raises the question of mere justifiable necessity. In both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights. [p. 300, col. 2.]

A remote reversioner is not precluded from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned [p. 301, col. 1.]

Rani Anand Kunwar v. *Court of Wards*, 8 C. L. R. 381; 6 C. 764; 8 I. A. 14 at p. 22; 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique & Jackson's followed.

Petition of Kuppusami Pillay for substitution of his name in place of that of the deceased appellant, and for an order of revivor of the appeal and for leave to prosecute it in the usual way.

FACTS.—The deceased appellant instituted the suit to obtain a declaration that the adoption of the second respondent by the first, the widow of V. Venkatakrishna Pillai, was invalid. Both Courts in India dismissed the suit. The plaintiff thereupon appealed to His Majesty in Council, and filed his petition of appeal at the Privy Council Office on the 6th November 1913. The appellant died on the 19th November 1913 and on the application for the substitution of the petitioner in place of the deceased appellant the High Court reported that the petitioner was the next reversioner of the late V. Venkatakrishna Pillai, and that "an objection had been taken that according to the case of *Arunachalam* v. *Vellaya* (1) the appeal abates" on this petition.

Sir *Robert Finlay, K. C.*, and Mr. *Dube*, for the Petitioner: The plaintiff, presumptive reversioner in a suit for a declaration that an alleged adoption is invalid, represents all the contingent reversioners, who would be estopped from questioning the decision in the reversioner's suit: *Rani Dharam Kunwar* v. *Balwant Singh* (2). If the petitioner is estopped from questioning the decision under appeal in any suit he might bring, the decision in *Arunachellam* v. *Vellaya* (1) relied on by the High Court is wrong.

Messrs. *De Gruyther, K. C.* and *Brown*, for the Respondent:—There is a consensus of opinion that a suit like the present suit by the presumptive reversioner does not bind the

(1) 15 Ind. Cas. 461; 12 M. L. T. 199; 23 M. L. J. 719; (1912) M. W. N. 897.

(2) 15 Ind. Cas. 673; 16 C. W. N 675; 9 A. L. J. 730; 14 Bom. L. R 485; (1912) M. W. N. 641; 12 M. L. T. 95; 16 C. L. J. 60; 34 A. 398; 23 M. L. J. 200; 39 I. A. 142 at p. 148.

other reversioners. During the life-time of a Hindu widow there is no one who has any estate vested in him. A presumptive reversioner has only a right to succeed to her deceased husband's property, if he survives her. Such a right is not even transferable under the Transfer of Property Act, 1882. A suit for a declaration is governed by Specific Relief Act, 1877, and a declaration relating to an alienation by a Hindu widow and an adoption made by her is binding only on the parties to the suit: section 42, illustrations (*e*) and (*f*), and section 43 of the Specific Relief Act, 1877. It is, therefore, submitted that the petitioner is not bound by the decision under appeal and can bring a suit questioning the adoption.

On the death of the plaintiff in the suit the right to sue has not survived. The petitioner does not derive his title or claim through his grandfather, but has his own right to sue and is, therefore, not a legal representative of the deceased plaintiff and is not entitled to be substituted for him: Code of Civil Procedure, 1908, Order XXII, rules 1, 2, 3 and 4, and section 2 (11).

A suit by a reversioner for a declaration that an alienation by Hindu widow is invalid as against his reversionary rights abates on the death of the plaintiff and cannot be continued by his legal representative: *Sakyahani Ingle Rao Sahib* v. *Bhavani Bozi Sahib*(3), *Arunachellam* v *Vellaya* (1) and *Kommeneni Chinna Veerayya* v. *Kommeneni Lakshminarasamma* (4). To show that the decision in such a suit is binding on the plaintiff and not on any other reversioner; reference was made to *Doorga Pershad Singh* v. *Doorga Konwari* (5), *Isri Dutt Koer* v. *Musammat Hunsbutti Koerain* (6), *Bhagwanta* v. *Sukhi* (7), *Govinda Pillai* v. *Thayammal* (8) and *Rani Anand Kunwar* v. *Court of Wards* (9). The petitioner and his grandfather had no causes of action in which they were jointly interested and which they could unite in the same suit, and the petitioner has not obtained his right to sue by survivorship: see Code of Civil Procedure, 1908, Order, XXII, rule 3. For the purpose of the prosecution of the suit the petitioner is not a legal representative of the deceased plaintiff and his petition should, therefore, be dismissed.

Sir Robert Finlay, K. C., replied, referring to *Muthusami Mudaliar* v. *Masilamani* (10).

JUDGMENT.

MR. AMEER ALI.—The question for their Lordships' decision arises upon a petition for substitution of the petitioner in place of the deceased appellant, Venkatanarayana, who has died since the filing of his appeal to His Majesty in Council.

Venkatanarayana brought a suit, on the 29th of July 1907, in the High Court of Madras in its ordinary civil jurisdiction to obtain a declaration that the adoption of the second defendant by Subbammal, the first defendant, was invalid and did not affect his (Venkatanarayan's) reversionary interest in the ancestral estate of one Venkatakrishna deceased. Subbammal, in her answer, alleged that the adoption which the plaintiff sought to set aside was made by her under the authority of her husband given under a Will. The plaintiff, on the other hand, contended that the authority so given was revoked by a subsequent Will. The Courts in India have held on the construction of this document that it did not amount to revocation. Venkatanarayana, after the decision of the High Court in its appellate jurisdiction dismissing his suit, applied for the usual certificate to appeal to His Majesty in Council, which was duly granted, and an appeal was filed and was pending when he died on the 19th of November 1913.

The petitioner, Kuppusami Pillay, applies to be substituted in the place of the deceased appellant and for an order for revivor of the appeal and for leave to prosecute it "in the usual way." He alleges that Venkatanarayana in his life-time was a member of a joint undivided Hindu family consisting of himself, two sons, and two grandsons, one of whom was the petitioner; and that he was

(3) 27 M. 588.

(4) 15 Ind. Cas. 213; 11 M. L. T. 184; 22 M. L. J. J. 375; (1912) M. W. N. 442; 37 M. 406.

(5) 5 I. A. 149 at p. 163; 3 C. L. R. 31; 4 C. 190 (P. C.); 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21.

(6) 10 C. 324 (P. C.); 10 I. A. 150; 13 C. L. R. 418; 7 Ind. Jur. 557; 4 Sar. P. C. J. 459.

(7) 22 A. 33; A. W. N. (1899) 159.

(8) 28 M. 57; 14 M. L. J. 209.

(9) 8 I. A. 14 at p. 22; 8 C. L. R. 381; 6 C. 764; 4 Shome L. R. 78; 4 Sar. P. C. J. 195; 5 Ind. Jur. 161; Rafique and Jackson's P. C. No. 63.

(10) 5 Ind. Cas. 42; 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49.

now the sole surviving member thereof, and entitled to the reversionary interest in Venkatakrishna's ancestral properties.

The application is opposed on the ground that, as the petitioner is not the legal representative of Venkatanarayana in respect of the reversionary right claimed by him to the estate of Venkatakrishna, he cannot be substituted in place of the deceased appellant. It is contended on the authority of certain decisions of the High Court of Madras that where a transaction by a Hindu female taking a limited estate in the inheritance of the last male owner is impugned by the next or presumptive reversioner as invalid and beyond her competency, any adjudication against him does not operate as *res judicata* against the contingent reversioners, and consequently on the death of the presumptive reversioner the others have each, in order of succession, a separate right of suit, and cannot claim to prosecute an action brought by the deceased reversioner as they do not derive their right through him.

Their Lordships think this argument proceeds on an obvious fallacy. Under the Hindu Law the death of the female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her life-time, however, the reversionary right is a mere possibility or *spes successionis*. But this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death. The Indian Law, however, permits the institution of suits in the life-time of the female owner for a declaration that an adoption made by her is not valid, or an alienation effected by her is not binding, against the inheritance. The two Articles of the Indian Limitation Act (IX of 1908) which deal with these two classes of suits differ widely in their language; Article 118, Schedule I, contains no restriction as to the person entitled to sue; whilst in Article 125 the suit is contemplated to be by the person "who, if the female died at the date of instituting the suit, would be entitled to possession." But it does not follow from these words that the suit brought in the latter case by the nearest reversioner is for his personal benefit, for the object is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike. Of course, the two classes of suits covered by these two Articles are distinct in their scope and character: one relates to status and involves the adjudication of a right *in rem*; the other raises a question of mere justifiable necessity. But in both "the right to sue" is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights.

In the present case Venkatanarayana sued for a declaration that the adoption of the second defendant was invalid. Such a suit brought by the presumptive reversioner is in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just as the relief sought is for their common benefit. On the death, therefore, of the presumptive reversioner the next presumable reversioner would clearly be entitled to continue the action instituted by the deceased plaintiff, unless there is anything in the Procedure Law of India to preclude him from so doing.

The Madras High Court has drawn a distinction between a suit brought to challenge an adoption and one to declare an alienation by a qualified owner as not binding beyond the life-time of the alienor. In the first class of cases it has been recognised that the presumptive reversioner's suit is in a representative character; in the other, however, chiefly on the ground that the adjudication relating to an alienation in the suit of the presumptive reversioner does not operate as *res judicata* against contingent reversioners, it has been held that these have no right to continue an action brought by him. Although, no doubt, as their Lordships have already remarked, there is great difference in the character of the two classes of suits, the position of the plaintiffs in both instances, when closely examined, will be found, so far as the point for decision is concerned, to be the same. The test of *res judicata* applied by the Madras High Court seems, therefore, to be irrelevant to the inquiry whether the petitioner is entitled to continue the action commenced by his grandfather.

What has to be considered is "whether the right to sue," in the words of the

Statute, "survives," and if it does, who can continue the action to obtain the relief that is sought?

For the purposes of this application it must be assumed that the facts stated in the petition, which their Lordships note are not controverted, are true, and that Venkatanarayana was the nearest reversioner when he brought his suit, and that the present petitioner was at the time only a contingent reversioner. In the case of *Anund Koer* v. *The Court of Wards* (9) this Board gave expression to the principles applicable to suits by reversioners to impugn the validity of transactions by Hindu females. They said that :—

"As a general rule such suits must be brought by the presumptive reversioner, that is to say, by the person who would succeed if the widow were to die at that moment."

But in laying down this broad rule their Lordships pointed out in clear terms that under certain circumstances the "next presumable reversioner would be entitled to sue."

There is nothing to preclude a remote reversioner from joining or asking to be joined in the action brought by the presumptive reversioner, or even obtaining the conduct of the suit on proof of laches on the part of the plaintiff or collusion between him and the widow or other female whose acts are impugned. It is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore, from the question "whether the next presumable heir" is "the legal representative" of the deceased presumptive reversioner, there remains the outstanding fact of identity of interest on the part of the general body of reversioners, near and remote, to get rid of the transaction which they regard as destructive of their rights.

Rule 1, Order XXII, in the new Civil Procedure Code of India (Act V of 1908), which corresponds with section 361 of Act XIV of 1882, declares that "the death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives." Rule 3, clause 1, provides that—

"Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit."

The words "legal representative" have for the first time been defined in sub-section 11, section 2, of Act V of 1908, which runs thus :—

"'Legal representative' means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued."

Sub-section 11 was embodied in Act V of 1908 with the object of putting in statutary language the results of the decisions of the Indian Tribunals on the meaning of the words "legal representative;" but it is not clearly worded and has already been the subject of criticism by at least one of the High Courts in India. The phraseology of sub-section 11, in their Lordships' opinion, is fairly open to the contention that the suit was brought by the deceased plaintiff as representing, in his reversionary right, the estate of the last male owner, and that on his death such right devolved on the petitioner. They think, however, that his right to be substituted in place of the deceased appellant rests on a broader ground.

Rule 1, Order I, of Act V of 1908, which brings the Indian practice into line with the English rule, provides as follows :—

"All persons may be jointed in one suit as plaintiffs, in whom any right to relief in respect of, or arising out of, the same act or transaction, or series of acts or transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise."

It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit. The right to relief on the part of the reversioners

exists severally in order of succession, and arises out of one and the same transaction impugned as invalid and not binding against them as a body; and the dispute involves a common question of law, *viz.*, the validity of the act challenged as incompetently done. If the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's action, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. Their Lordships are of opinion that in this case the right to sue survives, and that the petitioner is clearly entitled to the order asked for. The costs of this application will be costs in the appeal.

Petition allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 23 OF 1915.

April 21, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

UMRAO KUNWAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BADRI—PLAINTIFF—RESPONDENT.

Hindu Law—Will executed by widow—Reversioner's suit for declaration, whether maintainable.

A suit by a reversioner for a declaration that a Will executed by a Hindu widow in respect of her husband's property is void and not binding upon him, is not maintainable, as there is no alienation by the widow.

Ram Bhajan Kunwar v. *Gurcharan Kunwar*, 1 A. L. J. 468; A. W. N. (1904) 150; 27 A. 14; *Jaipal Kunwar* v. *Indar Bahadur Singh*, 26 A. 238, 31 I. A 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 1490, referred to.

First appeal from an order of the District Judge of Meerut.

The Hon'ble Dr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *S. M. Sulaiman*, for the Respondent.

JUDGMENT.—This was a suit by a plaintiff claiming to be the next reversioner under the Hindu Law to the estate of one Dewa. The said Dewa died leaving a widow, Umrao Kunwar. This lady has executed a Will bequeathing the property in her hands as widow of Dewa to one Tika Ram, son of Naidar, brother of the said Dewa. In the Will there is a recital to the effect that the bequest is made in accordance with oral directions given by Dewa. The plaintiff sought a declaration that the Will in question is void and ineffectual as against his interest and that Tika Ram, who was impleaded as defendant No. 2, will acquire no rights under the said Will. The Court of first instance dismissed the suit upon a preliminary point, holding that there had been no alienation by Umrao Kunwar of the property in her hands and that under the circumstances the mere execution of a Will would not afford a sufficient reason for granting a declaratory decree. It supported itself by a quotation from Mulla's Principles of Hindu Law. The learned District Judge on appeal has reversed the finding on the preliminary point and remanded the case for trial on the merits. He bases his decision upon the reported case of *Jaipal Kunwar* v. *Indar Bahadur Singh* (1). It is obvious that in that case their Lordships of the Privy Council maintained the decision of the Courts in India with considerable reluctance and carefully guarded themselves against being understood to hold that the execution of a Will, under such circumstances as the present, would afford a cause of action for a declaratory suit on the part of the nearest reversioner. It is certainly not the practice of this Court to encourage such suits, vide *Ram Bhajan Kunwar* v. *GurcharanKunwar* (2). The learned District Judge, moreover, while purporting to follow the Privy Council ruling quoted by him, has really departed from the spirit of that ruling by interfering with the decision of the Court of first instance. We think that the learned Additional Subordinate Judge was right in refusing to grant the declaration sought by the plaintiff and gave good reason for his decision. We set aside the order of the Court below and restore the decree of the Court of first instance dismissing the suit. The defendants-appellants will get their costs in this Court and in the lower Appellate Court.

Appeal decreed.

(1) 26 A. 238; 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 1490.

(2) 1 A. L. J. 468; A. W. N. (1904) 150; 27 A. 14.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 65 OF 1914.

March 23, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

MOOLCHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

P. ALWAR CHETTY—PLAINTIFF—RESPONDENT.

Contract Act (*IX of* 1872), *s.* 44—*Joint judgment-debtors—Release of one, release of other—Amount paid by one*—Protan to *reduction of liability.*

The release of a joint judgment-debtor does not operate as release of the others. It confers on them no higher rights than they would have had prior to the judgment, but they can claim the benefit of the amount actually paid by the released judgment-debtor. [p. 305, col. 1.]

Gurusami Chetti v. *Samurti Chinna Munnar* and *Gurusami Chetti* v. *Sadasiva Chetti*, 5 M. 37, dissented from.

In re E. W. A., a Debtor, (1901) 2 K. B. 642; 70 L. J. K. B. 810; 85 L. T. 31; 49 W. R. 642; 8 Manson, 250; *Sheo Churn Lall* v. *Ram Saran Sahoo*, 16 W. R. 49; *Nunkoo Lall* v. *Musammat Dhunesh Kooer*, 17 W. R. 496; *Ram Ratan Kapali* v. *Aswini Kumar Dutt*, 6 Ind. Cas. 69; 14 C. W. N. 849; 11 C. L. J. 503; 37 C. 559; *Bhawani Koer* v. *Darsan Singh*, 11 Ind. Cas. 450; 14 C. L. J. 354: *Ramanjulu Naidu* v. *Aramudu Iyengar*, 5 Ind. Cas. 735; (1910) M. W. N. 35; 7 M. L. T. 373; 33 M. 317, referred to.

Appeal from the judgment of the Honorable Mr. Justice Kumaraswami Sastri, in the Ordinary Original Civil Jurisdiction, in Execution Application in Civil Suit No. 176 of 1909.

Mr. *G. Annaji Row*, for the Appellants.

Mr. *C. P. Ramaswami Aiyar*, for the Respondent.

JUDGMENT.

NAPIER, J.—This appeal is from an order passed by Mr. Justice Kumaraswami Sastri. It was made on the application by the plaintiff in execution of the decree in Civil Suit No. 176 of 1909. The decree is as follows: "That Kastoor Chand, Nattoji, Mulchand and Omed Mull, the defendants herein, do pay to the plaintiff the said sum of rupees twenty-three thousand," etc. Subsequently to the decree a petition was put in under Order XXI, rule 2, of the Civil Procedure Code by the 1st and 2nd defendants and not opposed by the decree-holder for a certificate by the Court of the adjustment of the decree as against them, and an order was passed "that the plaintiff herein do enter up satisfication of the decree herein in full as against the 1st and 2nd defendants herein as agreed to by him by the said agreement." Latter when the execution application above referred to as against the other defendants was put in, objection was taken that the decree had been fully satisfied by the adjustment referred to, on the ground that the discharge of one of several joint promisors discharges the others as well. Mr. Justice Kumaraswami Sastri overruled the objection and ordered execution to issue.

It is contended before us that the learned Judge was wrong on two grounds, (1) that satisfaction having been entered up nothing remains, and (2) that the release of one judgment-debtor operates in favour of all.

On the *first* point it is only necessary to observe that the term "satisfaction," although used in the order, is not one contemplated by the Civil Procedure Code. The words of Order XXI, rule 2 are: "The decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly." Admittedly the decree has been adjusted by payment so far as the 1st and 2nd defendants are concerned, but there has been no satisfaction, although that word appears in the order.

The *second* point is one of more substance. It is argued that although section 44 of the Indian Contract Act provides that a release of one or more joint promisors does not discharge the other joint promisor or joint promisors, that has reference only to obligations arising out of contract and does not apply to judgment debts; that under the English Law a release of one promisor of a contractual joint debt, or of one judgment-debtor in respect of a judgment joint debt does discharge the co-obligor, that in the original civil jurisdiction of the High Court the law as administered in England prevails, and that, therefore, there being no statutory provision as to a judgment debt the English Law of discharge still obtains. In my opinion this argument is fallacious. Admitting that according to the English Law the fact that a debt is a judgment debt makes no difference and that release in favour of one judgment-debtor operates in favour of the others, it is only necessary to see

the basis on which this doctrine is founded to establish the fallacy in the argument. In *In re E. W. A, a Debtor* (1) (in the Court of Appeal) it was contended that where the foundation of the obligation was a judgment, the doctrine of release did not apply. Lord Justice Collins overrules this contention in the following words: "I cannot see any foundation in principle for the distinction, for under any judgment or other obligation creating a joint liability, there is only one debt and that being so, the rule that the release of one of the joint debtors gets rid of the debt, applies equally whether the obligation arises on a judgment or on any other security. It is too late now to question the law that, where the obligation is joint and several, the release of one of two joint debtors has the effect of releasing the other." The view of the Court is clear, namely, that, where a right to release arises on the original contractual liability, the fact that a liability under a judgment has been substituted for that original liability, cannot increase the burden or deprive the debtor of the right given to him by the substantive law. It necessarily follows that where a substantive law has been altered, as has been done by the Indian Contract Act, and the benefit of the doctrine of release has been taken away from a joint debtor, the basis of the rule disappears. I do not think it necessary to discuss the soundness of the decision of this Court in *Gurusami Chetti* v. *Samurti Chinna Munnar* and *Gurusami Chetti* v. *Sadasiva Chetti* (2) that in an appeal from the original side the English Law has to be administered, but I must not be taken to accept the correctness of that conclusion. On principle I am clear that just as the debtor cannot in England be deprived of this right which attaches to his contract by reason of the fact that the contract debt has merged in a judgment debt, so in India the creditor cannot be deprived of his statutory right to proceed against a joint debtor in spite of a release by reason of the fact that the contractual debt has merged in a judgment debt. It is notitceable that the English Law was not accepted by the Courts in India in dealing with cases from the mofussil even prior to the Contract Act. For in two cases, *Sheo Churn Lall* v. *Ram Sarun Sahoo* (3) and *Nunkoo Lall* v. *Musammat Dhunesh Kooer* (4), respectively, it was held that a judgment-creditor is entitled to realize his debt from any one of the debtors and that by proceeding against one, he does not relieve the other debtors from their joint liability to him. In *Ram Ratan Kapali* v. *Aswini Kumar Dutt* (5) and *Bhawani Koer* v. *Darsan Singh* (6), the point was considered at great length by Mookerjee, J. He relies on the two Calcutta cases above referred to as establishing the law outside the provisions of the Contract Act and bases the variance from English Law on the obvious grounds of justice, equity and good conscience, and he points out that in England there has been a tendency to restrict the operation of the Common Law by a refined distinction between a release and a covenant not to sue. That this distinction exists is clear from the language of Romer, L. J., in *In re E. A. W. a Debtor* (1), the case above referred to. For in that case the learned Lord Justice expresses a doubt whether "having regard to the form of the document and the surrounding circumstances there was not a discharge of the debt, but only a discharge of a particular debtor from the liability as against himself personally: in other words, an *agreement by the Bank not to sue him*". It is clear, therefore, that even in England the Courts will favour the construction of a document in a manner beneficial to the creditor. Sir Frederick Pollock in dealing with the result of section 43 of the Indian Contract Act says:

"We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, a judgment against one of several joint promisors, remaining unsatisfied, cannot in British India be held to be a bar to a subsequent action against the other promisor or promisors." This view was adopted by this Court in *Ramanjulu*

(1) (1901) 2 K. B. 642; 70 L. J. K. B. 810; 85 L. T. 31; 49 W. R. 642; 8 Manson, 250.
(2) 5 M. 37.
(3) 16 W. R. 49.
(4) 17 W. R. 496
(5) 6 Ind. Cas. 69; 37 C. 559; 14 C. W. N. 849; 11 C. L. J. 503.
(6) 11 Ind. Cas. 450; 14 C. L. J. 354.

Naidu v. *Aramudu Iyengar* (7), where it was argued that the omission in a previous suit against one of several joint promisors of a part of the cause of action was a bar under section 43 of the Civil Procedure Code to a subsequent suit against a joint promisor for the balance so omitted. Krishnasami Iyer, J., in an elaborate judgment after considering all the authorities, declined to limit the logical result of the operation of section 43 of the Contract Act by the language of section 43 of the Civil Procedure Code. I adopt the reasoning of the very eminent jurist referred to and of the learned Judge in that case, which, in my opinion, applies with equal force to section 44, namely, that you must look to the substantive law and must give full effect to it; and in that view it seems to me clear that a release of a judgment-debtor can give his co-judgment-debtor no higher rights than he would have had prior to the judgment and that full effect must be given to the substantive law laid down in section 44.

That being so, there is no force in the last contention for the appellant, that the release enures for the proportionate amount of the debt. Reliance is placed on language to be found in the judgment of Mookerjee, J., in *Bhawani Koer* v. *Darsan Singh* (6) and I agree that where consideration for the release is not the payment of a definite portion of the debt but an adjustment otherwise than by payment, within the meaning of Order XXI, rule 2, difficulties may arise in ascertaining the amount of the balance remaining due; and that, therefore, it may be necessary to hold that the adjustment operated to the extent of the proportionate liability of the released judgment-debtor as between him and his co-judgment-debtors. But whereas in this case the amount received by the judgment-creditor was a specific sum, I am clear that as the liability of the other judgment-debtors is for the whole amount of the debt, they can only claim the benefit of the amount actually paid by the judgment-debtor who has been released. In my view, therefore, this appeal fails and must be dismissed.

(7) 5 Ind. Cas. 135; (1910) M. W. N. 35; 7 M. L. T. 373; 33 M. 317.

SADASIVA AIYAR, J.—I entirely agree. I only wish to add the following remarks: (1) If the passage (at page 46) in the judgment of Muthusami Iyer, J., in *Gurusami Chetti* v. *Samurti Chinna Munnar* and *Gurusami Chetti* v. *Sadasiva Chetti* (2) was intended to lay down that the High Court on its original side is bound to decide questions like the one in controversy on the basis of English precedents and English Common Law procedure, even though the following of such precedents and procedure may be against "justice and right" or the "justice, equity and good conscience" which are the true guides to be followed according to the Charter Acts, I respectfully differ from the observation in that passage. The doctrine that the release of one joint debtor releases the others is an artificial doctrine not consonant with "justice and right." (2). It was decided in *Bhawani Koer* v. *Darsan Singh* (6), that the decree-holder in that case ought to give credit to the proportionate sum due by the released judgment-debtor, on the basis that all the judgment-debtors were liable equally among themselves to pay the decree amount. That decision is (if I may say so), no doubt, justifiable on the facts of that case. But it could not, in my opinion, be extended as a support to the very broad proposition that even if the creditor realized only a definite and lesser proportionate amount from the released joint debtor or debtors, he has not got the right to go against the other debtors for the whole of the remaining balance but only what would be found to be the latter's proportionate share if the decree amount was equally divided between all the debtors, including the released debtor or debtors.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 570 OF 1912.

April 13, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

HARDIT SINGH—DEFENDANT—APPELLANT

versus

BEHARI LAL AND OTHERS—PLAINTIFFS AND OTHER DEFENDANTS—RESPONDENTS.

Sale, oral—Receipt of earnest money—Out-and-out

HARDIT SINGH *v.* BEHARI LAL.

sale—Incorrect entry of mortgage amount on that property, effect of—Failure of prompt execution and registration of sale-deed, effect of—Purchaser of property under registered deed with notice of prior oral sale, right of—Mortgage—Equity of redemption, sale of—Purchaser, right of, to redeem.

Where a receipt of earnest money for the sale of equity of redemption of a house distinctly mentions an out-and-out sale as having been effected, the mere fact that it goes on to say that a sale-deed will be drawn up does not show that the sale contract is incomplete, nor is an incorrect entry of the amount of a mortgage on that property an indication of the incompleteness of the sale. [p. 307, col. 2.]

The fact that such a receipt is not promptly followed by the execution and registration of a formal sale-deed is not sufficient to warrant a finding that the intention of the parties was that title should not pass until the consideration money had been paid in full. [p. 307, col. 2.]

A subsequent purchaser of the equity of redemption of a mortgage under a registered deed, having notice of a prior oral sale of the same property, acquires no title and has no right to redeem the mortgage. [p. 308, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division, at Jullundur, dated the 29th January 1912, modifying that of the Subordinate Judge, first Class, Amritsar, dated the 21st August 1911, decreeing claim on payment of Rs. 4,700.

The Hon'ble Mr. *Muhammad Shafi*, K. B., for the Appellant.

Mr. *Manohar Lal* and Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—This judgment will cover the two connected Appeals Nos. 602 and 733 of 1912.

The facts are as follows. Lal Chand mortgaged his house for Rs. 1,500 to Narain Singh on 23rd October 1867. Lal Chand is now dead. Bhagat Ram, his heir, sold the house to Behari Lal and Sant Ram by sale-deed executed on 20th December 1910 and registered on 3rd January 1911. These vendees now sue to redeem. Apart from disputes as to the amount of money payable in redemption and as to the mortgage being really a sale—disputes into which for reasons which will presently appear we need not enter—the defence is that the plaintiffs have no title, Bhagat Ram having sold the equity of redemption to Ganpat Rai prior to the transaction with the plaintiffs. Ganpat Rai was added as a co-defendant.

In support of the alleged sale to Ganpat Rai, a receipt bearing a one-anna stamp was put in. This receipt is for Rs. 99 earnest money. It is dated 10th December 1910, and states that the sale had been effected on the previous day. The first Court regarded the date of this receipt as doubtful, thinking it had been fabricated subsequently and antedated in order to defeat the plaintiffs' claim. The first Court further held that at the outside this document was merely an agreement to sell. So the first Court, after discussing rent, interest, improvements, etc., gave the plaintiffs a decree for redemption on payment of Rs. 4,700.

The learned Divisional Judge differed from the first Court as to the receipt being antedated, but was not satisfied that any title had passed to Ganpat Rai. The Divisional Judge held that there were strong indications that the intention of the parties was that title should not pass till a sale-deed had been drawn up, and the balance of the sale price had been paid before the Sub-Registrar. The Divisional Judge further held that even if there had been a genuine and unabandoned agreement to sell to Ganpat Rai, the plaintiffs' registered deed must be awarded the preference, as there was no reliable evidence that plaintiffs had ever had notice of the earlier contract. So the Divisional Judge upheld the decree of the first Court, but he reduced the amount of money to be paid by the plaintiffs to Rs. 3,500.

There are three appeals to this Court:

(1) The plaintiffs appeal, claiming to redeem on payment of Rs. 1,500 only.

(2) Ganpat Rai appeals, urging that by reason of the prior sale to him the plaintiffs have no rights in the house.

(3) Hardit Singh, son of Narain Singh, who is now the mortgagee, appeals, urging (*a*) that plaintiffs have no rights in the property, the house having previously been sold to Ganpat Rai, and (*b*) that the plaintiffs should, if they have any right to redeem, pay a larger sum than that fixed by the Divisional Judge.

With reference to the latter plea, Mr. Shafi states that he claims the Rs. 1,200 which is the difference in the redemption money as fixed by the two lower Courts, plus interest at the rate of (Rs. 135 less Rs. 84) Rs. 51 per annum. This works

out to about Rs. 2,577, so we have had the stamps on this appeal made up to Rs. 155.

The *first* question to consider is the genuineness of the receipt put forward by Ganpat Rai. This receipt was registered on the 21st February 1911. There is oral evidence as to the sale to Ganpat Rai, but we could not regard this evidence as reliable unless there were some corroboration in the shape of documentary evidence. If the receipt was really executed on the 10th December 1910, we think it must be regarded as first class corroboration of the oral evidence as to the sale, for it is utterly improbable that a sham receipt should have been executed on the 10th December 1910 in order to defeat a sale which had not then taken place. If, however, the receipt was not written until *after* the sale to the plaintiffs it is obviously a mere fraud.

The first Court in its judgment has made a mistake in saying that there is no entry relating to this receipt in the register of the deed-writer. The Divisional Judge noted this mistake, but apparently never saw the register. The register was not in this Court on the first day of hearing, but on our intimating that it should be produced, if possible, a messenger was sent to Amritsar and the register was produced the following day. The deed-writer, Hari Singh, is now dead, so the register was obtained from a relation. We found the register in good order, and neither we nor Counsel for the plaintiffs could, on examination, find any ground for suspecting that the register had been tampered with in any way. The deed-writer was a man who had a fair amount of work to do. There are over 900 entries in his register for the year 1910. The entry in question is No. 886 in the register. It begins near the foot of one page and is concluded on the following page. Above it are two entries, one of the 8th December, and one of the 9th. It is followed by entries of the 12th, 13th, 14th, 16th, 18th December, and so on. Serial numbers follow in proper order, and we fail entirely to see how this entry can have been interpolated subsequently unless the binding of the book was tampered with and a page changed, which so far as we can see has not been done. The mere fact that the serial number of the entry in the register is not quoted on the receipt we regard as of no importance whatever. In fact if the receipt were a subsequent fabrication, it would be perfectly easy to enter the serial number on the receipt. We hold the receipt to be genuine, and accept the evidence as to the sale to Ganpat Rai.

We cannot for a moment accept the contention that the transaction was merely an agreement to sell. The receipt distinctly mentions an out-and-out sale as having been effected on the previous day, and the mere fact that it goes on to say that a sale-deed will be drawn up is, in our opinion, no good ground for holding that the sale contract was incomplete. Nor do we regard the fact that the receipt incorrectly puts the amount of the mortgage money due to Hardit Singh as Rs. 1,300, as an indication that the sale contract was incomplete. The essential point is that the equity of redemption was sold for Rs. 850, the vendee being left to arrange redemption with the mortgagee, who might, of course, claim a good deal more than the principal mortgage debt, though the new owner would naturally wish to redeem as cheaply as possible. That the receipt was not promptly followed by the execution and registration of a formal sale-deed is, so far as we can see, the only fact which can be pointed to as telling in any way against Ganpat Rai, and this we do not regard as at all sufficient to warrant a finding that the intention of the parties was that title should not pass until the consideration money had been paid in full.

Then it is urged that under section 48 of the Registration Act the plaintiffs' registered deed must be given the preference as the sale to Ganpat Rai was not accompanied by delivery of possession. But it is owned that this section will not help the plaintiffs if they had notice of the prior sale to Ganpat Rai. There is oral evidence to the effect that they had notice. Sham Das says Sant Ram said in his presence, with reference to the former sale, that a writing on a one-anna stamp was no good. Narain Singh also says he mentioned the prior sale to

Sant Ram. Karm Chand says he went to Sant Ram at Bhagat Ram's request to ask Sant Ram not to make him execute a deed, as he had already written a document in favour of Ganpat; but that Sant Ram said a writing on a one anna stamp was of no avail. Bishen Das says he warned Sant Ram of the prior sale. No doubt it may be said that oral evidence of this sort can easily be produced. Karm Chand's sister is married to Bhagat Ram, and Bishen Das has been convicted of criminal breach of trust. But we must look at probabilities. The wives of Bhagat Ram and Sant Ram are cousins. Unless Sant Ram knew of the prior sale there would be no need for him to enter into negotiations with Bhagat Ram secretly, and if he entered into negotiations in the usual manner, it is natural enough to suppose that neighbours and others would get to hear of what was going on and that Sant Ram would be warned of the prior sale. The part played by Bhagat Ram was clearly a double one, and it is to be noted that on 23rd December 1910 the plaintiffs applied for the sale-deed to be registered compulsorily, though Bhagat Ram raised no objections apparently before the Sub-Registrar when the sale-deed was registered on 3rd January 1911. We see no sufficient reason for rejecting the evidence as to notice. Possibly plaintiffs were already negotiating with Bhagat Ram before the sale to Ganpat Rai, but whether this were so or not it appears to us that Sant Ram, thinking that a sale evidenced only by a receipt on a piece of paper bearing a one-anna stamp could easily be disregarded, induced Bhagat Ram to enter into a fresh sale.

The result is that we find that the prior sale to Ganpat Rai must be recognized and that the plaintiffs, having no title, cannot redeem.

We accept the appeals of Hardit Singh and Bhagat Ram and dismiss the appeal of plaintiffs. The plaintiffs' suit is dismissed, and they will pay costs in both the lower Courts, and in all three appeals in this Court.

Appeal accepted.

CALCUTTA HIGH COURT.

CIVIL RULE *Nisi* No. 1137 OF 1914.

March 23, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

NOBIN CHANDRA CHOWDHURY AND OTHERS—PETITIONERS

versus

BEPIN CHANDRA ROY CHOWDHURY —OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885 amended by Act I of 1908), s. 153, proviso and explanation, scope of—Sale—Irregularity—Question relating to title or some interest in land - Civil Procedure Code (Act V of 1908), O. XXI, r. 90, order under, whether appealable—Irregularity and fraud in publishing or conducting a sale.

Per *N. Chatterjea, J.*—Under Explanation to section 153 of the Bengal Tenancy Act (Eastern Bengal and Assam Tenancy Act) a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. [p. 309, col. 1.]

The question whether, or not, a case comes under the proviso to section 153, Bengal Tenancy Act, is to be determined by the Appellate Court not with reference to the question which may be raised in appeal, but with reference to the question decided by the order of the Subordinate Court. [p. 309, col. 2.]

An order setting aside or declaring to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to section 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section. [p. 309, col. 1.]

Kali Mandal v. *Ramsarbaswar Chakravarti*, 32 C. 957 (F. B.); 1 C. L. J. 476; 9 C. W. N. 721, followed.

An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of the sale. [p. 310, col. 1.]

Section 153, Explanation, applies only to cases where there is a question as to irregularity in publishing or conducting a sale. [p. 310, col. 1.]

An application to set aside a sale made by a person (who prior to the sale had purchased the holding) more than a month after the sale comes within section 47 of the Civil Procedure Code and is not time-barred, section 18 of the Limitation Act being applicable to the circumstances of the case. [p. 310, col. 2.]

Arjun Das v. *Gunendra Nath Basu*, 27 Ind. Cas. 294; 20 C. L. J. 341; 18 C. W. N. 1266, referred to.

A question as to fraud in publishing or conducting a sale is not covered by the Explanation to section 153 of the Bengal Tenancy Act. [p. 310, col. 2.]

Per *Mullick, J.*—An irregularity in publishing or conducting a sale may be accompanied with or without fraud. [p. 311, col. 1.]

NOBIN CHANDRA *v.* BEPIN CHANDRA ROY.

Section 153, Explanation, does not expressly exclude from its scope an irregularity tainted by fraud. [p. 311, col. 1.]

In the matter of Miscellaneous Appeal No. 40 of 1914 of the Court of the District Judge of Rangpur.

Babu *Atul Chandra Gupta*, for the Petitioner.

Babu *Mohini Mohan Chakravarti*, for the Opposite Party.

JUDGMENT.

N. CHATTERJEA, J.—The question raised in this Rule is, whether an appeal lay against an order of the Munsif refusing to set aside a sale held in execution of a decree passed in a suit for recovery of rent, in which the amount claimed did not exceed fifty-rupees, the Judicial Officer, who passed the decree and order, having been empowered to exercise final jurisdiction under section 153 of the Bengal Tenancy Act.

The determination of the question depends upon whether the order of the Munsif has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, within the meaning of section 153 of the Act.

Now, the Full Bench in the case of *Kali Mandal* v. *Ramsarbaswar Chakrvarti* (1) held that an order setting aside or declining to set aside a sale in execution of a decree for rent (where the decree-holder is the purchaser) is an order deciding a question relating to title to land as between parties having conflicting claims thereto, and falls within the proviso to section 153 of the Bengal Tenancy Act, and is, therefore, appealable, though there could be no appeal from the decree in the suit on account of the prohibition contained in the section.

The Explanation which has been added to section 153 of the Bengal Tenancy Act, by the Amending Act I of 1908 (Eastern Bengal and Assam Tenancy Act) lays down that "a question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land or to some interest in land as between the parties having conflicting claims thereto." The learned District Judge held that the real question in this case was whether there was any material irregularity in publishing the sale, and that such a question according to the explanation to section 153 is not a question relating to title to land or to some interests in land as between parties having conflicting claims thereto. He accordingly held that no appeal lay to him and rejected the appeal.

The allegations, however, made in the application to set aside the sale are to the effect that no processes of attachment or proclamation were served upon the properties, and that the decree-holder, fraudulently and in collusion with the peon, got all the said processes suppressed and false returns to be submitted and thus brought about the sale. The sale, therefore, was sought to be set aside not merely on the ground of material irregularity as contended on behalf of the opposite party, but also on the ground of fraud in publishing the sale, if not on the latter ground alone.

The application, it appears, was made more than 30 days after the sale, and the Munsif refused to set aside the sale on the ground that there was no such fraudulent concealment of the execution proceedings on the part of the decree-holder as to bring the case within section 18 of the Limitation Act. He did not decide any question as "to the regularity of the proceedings in publishing or conducting the sale." It is to be observed that the question whether, or not, a case comes under the proviso to section 153, is to be determined not with reference to the question which may be raised, but with reference to the question *decided* by the order.

The Explanation, therefore, to section 153 of the Bengal Tenancy Act has no application to the present case, and an appeal lay against the order of the Munsif under the Full Bench decision referred to above. But even if it be held that the Munsif's order by implication decided a question as to fraud in publishing the sale, we have to see whether a question as to fraud in publishing a sale is "a question as to the regularity of the proceedings in publishing or conducting a sale" within the meaning of the explanation to section 153 of the Bengal Tenancy Act, and whether the effect of the Full Bench decision has been nullified by the said explanation as contended on behalf of the opposite party.

(1) 32 C. 957; 1 C. L. J. 476; 9 C. W. N. 721.

Now a sale may be set aside under Order XXI, rule 90, of the present Code of Civil Procedure, on the ground of material irregularity *or* on the ground of fraud in publishing or conducting a sale. Order XXI, rule 90, of the present Code of Civil Procedure, therefore, covers a case of material irregularity provided for by section 311, as well as a case of fraud coming under section 244 of the Civil Procedure Code of 1882. The distinction between an *irregularity* in publishing a sale and *fraud* in publishing a sale was well defined under the old, and is so under the present, Code, and I do not think that the Legislature by using the words "a question as to the regularity of the proceedings in publishing or conducting a sale" meant to include not only cases where a question arises as to the irregularity in publication or conduct of the sale, but also cases where there is a question of fraud in publishing or conducting the sale. An irregularity of the proceedings in publishing or conducting a sale is not the same as fraud in publication or conduct of the sale, and I think that if it was the intention of the Legislature to bar an appeal in cases where a question as to fraud in publishing or conducting a sale is decided, it would have expressed itself clearly by stating that "a question as to fraud or as to the regularity of the proceedings in publishing or conducting a sale" is not a question of title relating to title to land, etc. It seems to me that the Explanation applies only to cases where there is a question as to irregularity in publishing or conducting a sale, and that the effect of the Full Bench decision has been restricted to that extent only.

I am fortified in the view I take by the case of *Arjun Das* v. *Gunendra Nath Basu Mallik* (2). In that case proceedings to execute a decree for rent having been started more than a year after the judgment-debtor's death, writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served, and the decree-holder himself purchased the holding at the sale which followed. In an application to set aside the sale by a person (who prior to the sale had purchased the holding) more than a month after the sale, it was held that the application came within section 47 of the Civil Procedure Code, and was not time-barred, section 18 of the Limitation Act being applicable to the circumstances of the case, and the sale was set aside. The learned Judges (Mookerjee and Beachcroft, JJ.,) observed: "We may finally add that although the application must be deemed to have been made under section 47 of the Code of 1908, a second appeal may at first seem barred under section 153 of the Bengal Tenancy Act, as the claim in the suit for rent was under Rs. 100 [*Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (3)] but a second appeal does apparently lie in this case on the authority of the decision of the Full Bench in *Kali Mandal* v. *Ramsarbaswar Chakravarti* (1), the effect of which, as explained in *Beni Madhab* v. *Biseswar* (4), has not been completely nullified by the explanation added to section 153."

It was contended that we should not refer to the distinction between irregularity and fraud in the Code of Civil Procedure in construing a section of the Bengal Tenancy Act. But the provisions of the Civil Procedure Code, for setting aside a sale either on the ground of fraud or irregularity in publishing or conducting a sale, are applicable to sales held under the Bengal Tenancy Act, and the words "regularity of the procedure in publishing or conducting a sale" in the Explanation to section 153 evidently refer to such a ground for setting aside a sale under the Civil Procedure Code, and I am accordingly justified in referring to the provisions of that Code on the point.

I am of opinion that a question as to fraud in publishing or conducting a sale is not covered by the Explanation to section 153 of the Bengal Tenancy Act, and that the Full Bench decision still applies to a case where such a question is decided. Assuming, therefore, that the Munsif's order decided a question as to fraud in publishing the sale, I think that an appeal lay in this case against the order of the Munsif under the proviso to section 153 of the Bengal Tenancy Act.

(2) 27 Ind. Cas. 294; 18 C. W. N. 1266; 20 C. L. J. 341.

(3) 27 C. 484; 4 C. W. N. 269.
(4) 15 Ind. Cas. 436; 16 C. L. J. 542.

Musammat JEO *v.* JAIMAL SINGH.

The Rule is accordingly made absolute, the order of the District Judge set aside, and the case is remanded to the lower Appellate Court for the hearing of the appeal on the merits. Costs of this Rule, one gold *mohur*, will abide the result.

MULLICK, J.—The petitioners, who consist of two judgment debtors and a purchaser from a judgment debtor after the rent decree but before the sale, applied to the Munsif to set aside the sale on the ground of material irregularity and fraud. The Munsif found that the application was made more than 30 days after the sale and that the petitioners were not entitled to the benefit of section 18, Limitation Act, inasmuch as they had failed to show that they had been kept by the fraud of the opposite party from knowing about the sale and applying within time. This was not a finding upon a question as to the irregularity of the proceedings in publishing or conducting the sale and the Explanation to section 153, Bengal Tenancy Act, does not apply. An appeal, therefore, was competent having regard to the decision in *Kali Mondal* v. *Ram Sorbeswar Chakravorti* (1).

I agree, therefore, with my learned brother that the District Judge's order holding that no appeal lay was an order wrongly declining jurisdiction, and that the Rule should be made absolute with costs.

But with that part of my learned brother's judgment in which he expresses the opinion that an irregularity in conducting and publishing a sale caused by fraud is not covered by the Explanation to section 153, I respectfully venture to express a doubt. An irregularity in publishing or conducting a sale may be accompanied with or without fraud. The Explanation under consideration does not expressly exclude from its scope an irregularity tainted by fraud and there is nothing in the Civil Procedure Code of 1882, and much less in the Code of 1908, which compels us to limit the generality of the terms of the explanation and to give to it a meaning different from its apparent meaning.

The Rule, however, must be made absolute on the first ground and the appeal sent down to be heard on its merits.

Rule made absolute.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1849 OF 1912.

May 5, 1915.

Present:—Mr. Justice Shah Din and Mr. Justice Rossignol.

Musammat JEO—DEFENDANT—APPELLANT

versus

JAIMAL SINGH—PLAINTIFF—RESPONDENT.

Registration Act (*XVI of* 1908), *s.* 17 (2) (*i*)—*Civil Procedure Code* (*Act V of* 1908), *O. XXIII, r.* 3—*Compromise of suit*—Razinama, *if requires registration*—*Evidence, admissibility of* razinama *in.*

A *razinama* presented to a Court setting forth the terms on which the parties had come to terms does not require registration and is as such admissible in evidence. [p. 312, col. 2.]

Khair-ul-Nissa v. *Bahadur Ali*, 27 P. R. 1906; 11 P. L. R. 1906, followed.

Second appeal from the decree of the Additional Divisional Judge of the Shahpur Division at Sargodha, dated the 9th August 1912, varying that of the Subordinate Judge, Lyallpur, dated the 21st of February 1911, decreeing the claim.

Mr. *Muhammad Saleem*, for the Appellant.

Mr. *Jai Gopal Sethi*, for the Respondent.

JUDGMENT.—The learned Counsel for the appellant states at once in opening this appeal that he drops all other points, and confines his appeal to the one ground that the *razinama* on which the present suit was brought is inadmissible because it is unregistered. The facts of the case are clearly given in the judgments of the Courts below. Briefly put, one Hira Singh had property in Amritsar and also a square of land in Lyallpur. He bequeathed the whole of his property by a written Will to Jaimal Singh, plaintiff. Jaimal Singh sued *Musammat* Jeo and *Musammat* Jindan, who are both widows of Hira Singh, for possession of the Amritsar property. A counter-suit was brought by Ram Singh, step-son of Hira Singh, at about the same time for a declaration that the Will propounded by Jaimal Singh was invalid. Both suits were terminated by a compromise in accordance with which Ram Singh and Jaimal Singh were to share both the Amritsar and the Lyallpur properties equally. The present suit has been brought by Jaimal Singh to secure possession of his moiety of the Lyallpur property and it is based on the aforesaid compromise. The lower Appellate Court has held that the compromise was not a

conveyance but was merely a petition setting forth for the information of the Court, to which it was presented, the details of the settlement on which it asked the Court to dispose of the suit. Before us some details of resemblance between this *razinama* and the usual conveyance have been pointed out, but we think it quite unnecessary to mention these points in detail. In fact, it is urged that the *razinama* is a formal document by which one half share in the Lyallpur property was conveyed to the plaintiff. *Pranal Anni* v. *Lakshmi Anni* (1) and *Patha Muthammal* v. *Esup Rowther* (2) have been relied upon by the appellant. For the respondent it has been contended that the *razinama* now sued upon was not a formal conveyance nor an agreement, but is only a recital of the terms on which the parties had come to settlement, and after due consideration we have no doubt that this contention must prevail. In our opinion, the case reported as *Khair-ul-Nissa* v. *Bahadur Ali* (3), is very analogous to the present case. The so-called *razinama* is headed by the names of the parties in the manner which is usually employed in writing a petition. The language of the document is not of that formal nature which usually characterises a conveyance. In short, on the face of it the *razinama* is a petition and was clearly intended to be presented to the Court as such.

The petition was presented to the Court and the parties made statements with reference thereto. Although the parties were not questioned with reference to the Lyallpur portion of the property in dispute, it is quite clear to us that the settlement was intended by the parties to bring both cases to a termination, and the failure of the Court to question the parties concerning the Lyallpur property is intelligible when it is remembered that no decree could be granted to Jaimal Singh in respect of the Lyallpur property in the suit in which he was then a plaintiff. The reason for this was that he had not sued in that suit in respect of the Lyallpur property and, therefore, the decree could not cover any property which had not been included in the plaint.

(1) 22 M. 508; 26 I. A. 101; 3 C. W. N. 485; 9 M. L. J. 147.

(2) 29 M. 365.

(3) 27 P. R. 1906; 11 P. L. R. 1906.

On these grounds we hold that the *razinama* did not require registration and was admissible in the present suit to prove the plaintiff's claim. The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2519 TO 2525 OF 1912.

March 15, 1915.

Present:—Mr. Justice Chapman and Mr. Justice Walmsley.

IN NO. 2519 OF 1912

GURAI KAR AND OTHERS—PLAINTIFFS—APPELLANTS

IN NO. 2520 OF 1912

SUNDAR DUTT—PLAINTIFF—APPELLANT

IN NO. 2521 OF 1913

SURJAN GIRI—PLAINTIFF—APPELLANT

IN NO. 2522 OF 1912

BHIM AICH—PLAINTIFF—APPELLANT

IN NO. 2523 OF 1912

UJHAL KINLA—PLAINTIFF—APPELLANT

IN NO. 2524 OF 1912

SURJA PAUL AND OTHERS—PLAINTIFFS—APPELLANTS

IN NO. 2525 OF 1912

SAMP MANNA—PLAINTIFF—APPELLANT

versus

Srimati Rani KUARMONI SINGHA MANDHATA—DEFENDANT—RESPONDENT

IN ALL.

Bengal Tenancy Act (*VIII of* 1885), *s.* 106—*Tenant's right to cut and appropriate trees—Custom, reasonableness of—Question of law—Reasonableness, test for.*

The question whether a custom is reasonable or not is a question of law and not one of fact. [p. 313, col. 2; p. 314, col. 1.]

Bradburn v. *Foley*, 3 C. P. D. 129 at p. 135; 47 L. J. C. P. 331; 38 L. T. 421; 26 W. R. 423, followed.

It is wrong to hold that a custom is unreasonable in so far as it permits the appropriation of timber trees on a holding by the tenant. [p. 314, col. 1.]

Moult v. *Halliday*, (1898) 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 46 W. R. 318; 62 J. P. 8; 14 T. L. R. 109, referred to.

Where there is nothing unfair or dishonest or contrary to the public good in a custom, the custom is not unreasonable. [p. 314, col. 1.]

Appeals against the decrees of the District Judge, Midnapur, dated the 21st of December 1911, modifying those of the Revenue Officer, Rohini Camp, dated the 23rd of June 1908.

Babus *Mohindra Nath Roy*, *Monmatha Nath Mookerjee* and *Satindra Nath Mookerjee*, for the Appellants.

Babu *Bankim Chandra Mookerjee*, for Babu *Kali Kinkar Chakrabarti*, for the Respondent.

JUDGMENT.—These are appeals by the plaintiffs. The suits were brought under section 106 of the Bengal Tenancy Act for declarations that the tenants had the right to cut and appropriate trees. The Assistant Settlement Officer decreed the suits. The landlord appealed. The District Judge, in the course of his judgment, came to a finding that the custom had been established, but that it was unreasonable in so far as it permitted the appropriation of timber trees. By an oversight, however, the learned Judge recorded an order dismissing the landlord's appeal thus preserving the judgment of the Assistant Settlement Officer intact. Upon an *ex parte* application by the landlord, the learned Judge amended his judgment and converted his order dismissing the appeal into an order directing that the decree of the Assistant Settlement Officer should be modified, in accordance with his finding that the custom should not be upheld so far as timber trees are concerned. The tenants, thereupon, appealed to this Court. They relied in their grounds of appeal both on the contention that the learned Judge was wrong in holding that the custom was unreasonable and upon the contention that it was not open to the learned Judge to alter his judgment. The learned Judges who disposed of the appeal dealt in their judgment with the latter contention only and directed that the judgment should be restored to its original condition. The learned Judges proceeded to say that it would be open to the respondent landlord to apply for a review. Thereupon, the landlord applied for a review of this judgment and on that application for review, the learned Judge amended the judgment again, altering it into a judgment modifying the decree of the Assistant Settlement Officer in accordance with the finding that the custom was unreasonable so far as timber trees were concerned.

In appeal to this Court, the tenants take three grounds. The *first* ground is that the application for review was barred by limitation. The judgment which was sought to be amended by that application for review was dated the 23rd August 1911, that is, the judgment in the form in which it stood after the restoration made in it in accordance with the order passed by the learned Judges of this Court in second appeal. The application for review of this judgment was made on the 20th September 1911, and was within time. The appellants' contention that this application for review must be held to relate to the original judgment of the 7th April 1909, cannot he sustained, although there are certain expressions in the judgment of the learned District Judge now appealed against which might support their contention.

The *next* contention in appeal is that the learned Judge had no jurisdiction to entertain this application for review. The judgment purports to pass the order under section 151 of the Code of Civil Procedure, holding that the judgment, the review of which was applied for, was the judgment of his predecessor and that, therefore, he had no jurisdiction to deal with the application under Order XLVII. We are of opinion, however, that the learned Judge fell into an error in the view which he took, that the judgment the review of which was applied for was the judgment of his predecessor. It is true that the original judgment delivered on the 7th April 1909 was the judgment of the learned Judge's predecessor, Mr. Forrester. But the judgment, which in law was the judgment which had to be reviewed, was not that judgment but the judgment dated the 23rd August 1911, which was the result of the alteration made by the learned Judge, Mr. Cornes, himself. It was his judgment made under the order of the High Court. That was the judgment which had to be reviewed and the learned Judge had jurisdiction under Order XLVII, rule 1, to review that judgment on account of what he held, and rightly held, to be a mistake on the face of the record.

The appellants, however, contend that the judgment is wrong, upon the ground that the learned District Judge was not justified in holding that the custom was unreasonable in so far as it permitted the tenants to appropriate timber trees. The respondent argued that the question whether a custom

is reasonable or not is a question of fact and not of law. We need only to refer to the judgment of Lord Lindley in the case of *Bradburn* v. *Foley* (1), for authority for saying that the reasonableness or unreasonableness of a custom is a question of law. The respondent then argued that this point having been taken in the grounds of appeal to this Court at the time when this case came up before this Court on the previous occasion, it must be held that the point was then decided against the appellants and cannot now be re-argued. We are, however, satisfied that the learned Judges of this Court did not then decide this point. The appellants then succeeded on the technical ground which they took and whether this point was argued or not, we are of opinion that it is open to them to argue it now. The learned Judge upheld the findings of the Assistant Settlement Officer upon the question whether the custom of appropriating trees by the tenants had been established. The learned Assistant Settlement Officer held upon the facts that this custom covered a large number of trees of different kinds which are mentioned in this connection and the Assistant Settlement Officer recorded the finding that the custom covered all classes of trees. This finding was upheld by the learned Judge in appeal. The learned Judge gives no reasons for holding that this custom was unreasonable in so far as it permitted the appropriation of timber trees, and we are unable to agree with him that there was any unreasonableness in the custom. As was said by Channell, J., in *Moult* v. *Halliday* (2): "There can be very few cases, where a custom has been sufficiently proved, in which a Court could hold that it was unreasonable, for that it must be convenient is shown by the fact that it has been established and followed." There is nothing unfair or dishonest or contrary to the public good in the custom and we are unable to say that it was unreasonable.

The result is that this appeal is allowed, the judgment of the learned District Judge set aside and the judgment and decree of the Assistant Settlement Officer restored. The appellants are entitled to their costs. They are allowed three sets of costs for the seven appeals in this Court.

Appeal allowed.

(1) 3 C. P. D. 129 at p. 135; 47 L. J. C. P. 331; 38 L. T. 421; 26 W. R. 423.

(2) (1898) 1 Q. B. 125; 67 L. J. Q. B. 451; 77 L. T. 794; 46 W. R. 318; 62 J. P. 8; 14 T. L. R. 109.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1124 OF 1912.

April 17, 1914.

Present:—Mr. Justice Wallis and Mr. Justice Sadasiva Aiyar.

PASUMARTI PAYIDANNA—DEFENDANT No. 3—APPELLANT

versus

GANTI LAKSHMINARASAMMA AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1, 2, 4 AND 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Sale—Minor widow brought on record as legal representative of her deceased husband, judgment-debtor—Court kept in ignorance of minority of widow—An earlier and higher bid for same property in another suit concealed—Sale void—Suit for declaration competent without regard to s. 47—Fraud—Limitation Act (IX of 1908), Sch. I, Arts. 12, 166 applicability of.

In a suit for a declaration that the sale in execution of a decree was not binding on the plaintiff, the main objection to the sale was that at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record as the legal representatives of the judgment-debtor, their deceased husband, and at the date of the sale, the plaintiff was a minor, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major, though the 1st defendant-decree-holder and the 3rd defendant, the auction-purchaser, both knew that she was a minor. The Court was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction-purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down:

Held, that the plaintiff, who had no guardian *ad litem* at all, had not been a party to the suit, and that she was entitled to bring the present suit to declare it as not binding on her without regard to the provisions of section 47, Civil Procedure Code; [p. 316, col. 2; p. 318, col. 2.]

that the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, inasmuch as the other widow also had ceased to have any interest in the estate, the sale was not binding on the plaintiff, and did not require to be set aside; [p. 316, col. 2; p. 319, col. 2.]

that the plaintiff was entitled to a decree as the Court-auction sale was brought about by the fraud of the decree-holder and Court-auction-purchaser; [p. 317, col. 2.]

that the declaratory suit having been brought within three years of the plaintiff's attainment of majority was not barred, Articles 166 and 12 of the Limitation Act being alike inapplicable. [p. 317, col. 1; p. 319, col. 2.]

Second appeal from the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in Appeal Suit No. 205 of 1911, preferred against that of the Court of the District Munsif of Rajam in Original Suit No. 407 of 1909.

Messrs. *K. Srinivasa Aiyangar* and *V. Ramesam*, for the Appellant.

Mr. *B. N. Sarma*, for the Respondents.

JUDGMENT.

WALLIS, J.—This is a second appeal from the decree of the lower Courts declaring that the sale in execution of the decree in Original Suit No. 559 of 1903 on the file of the District Munsif of Vizagapatam was not binding on the plaintiff. The present plaint was presented as a petition in that suit, but was registered as a plaint in a separate suit under the new provision in section 47, Civil Procedure Code.

The facts may be briefly stated. The present 1st defendant had obtained decrees against plaintiff's husband in two suits Nos. 555 and 559 of 1903, and after his death his two widows, the plaintiff and the 2nd defendant, were brought on as his legal representatives by the Court of the District Munsif of Rajam, to which the decrees had been transferred for execution. One of the grounds taken by the plaintiff is that the Court to which the decrees had been transferred for execution was not the proper Court to bring on legal representatives of a deceased party, as decided by the Full Bench in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1), and that the order was a nullity. It is, however, unnecessary to consider this point, as the sale has been held not to be binding on another ground. The main objection to the sale is that, as found by the lower Courts, at the time when the plaintiff and the 2nd defendant, the co-widow, were brought on the record and at the date of the sale on 19th October 1906 the plaintiff was a minor, only attaining her majority in July 1907, while the other widow, the 2nd defendant, had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major though, according to the findings, the 1st defendant-decree-holder and the 3rd defendant, the auction, purchaser, both knew she was a minor. The attached properties which were subject to mortgages were first put up for sale by the 1st defendant in execution of his decree in Original Suit No. 555 of 1903 on the 15th October 1906. The properties were put up at Rs. 600 and the sale list, Exhibit H, shows that there were no bidders on the 15th, 16th and 17th and that on the 18th the present 3rd defendant bid Rs. 601. This sale was stopped at the instance, it is said, of the 3rd defendant because certain other decree-holders had applied for rateable distribution in the suit, a matter which was no business of his; and on the following day, the 19th, the 1st defendant applied orally to the District Munsif in the other Suit, No. 559 of 1903, and, on the plea that there were no bidders, got the reserve price reduced to Rs. 200, without telling the District Munsif of the sale in Original Suit No. 555 of 1903 and the bid of Rs. 601 by the 3rd defendant. The properties were then put up to sale in Original Suit No. 559 of 1903 and knocked down to the 3rd defendant for Rs. 201.

The Subordinate Judge has found, in my opinion, rightly, that this was a fraud upon the plaintiff. The properties should have been sold in execution of the decree in Original Suit No. 555 of 1903 in which they were first put up for sale, then the 1st defendants, as decree-holder in Original Suit No. 559 could, if so minded, have applied for rateable distribution of the sale proceeds; and the conduct of the 1st defendant and the 3rd defendant in proceeding with the sale in the second suit and getting the reserve price reduced by suppressing from the Court what had happened at the first sale amounted to a fraud upon the plaintiff. This fraud is not without some bearing on the main issue in the case, because, in view of what had happened in the absence of any proper representation of the judgment-debtor, it cannot be said that the plaintiff was not prejudiced by the omission to bring her properly on the record.

The respondent relies on two decisions of the Privy Council in *Khiarajmal* v. *Daim* (2), and *Rashid-un-Nisa* v. *Muhammad*

(1) 28 M. 466 (F. B.); 15 M. L. J. 116.

(2) 32 C. 296 at p. 314; 1 C. L. J. 584; 2 A. L. J. 71; 9 C. W. N. 201; 7 Bom. L. R. 1; 32 I. A. 23.

Ismail Khan (3), to show that the sales are wholly void against the plaintiff because she was not properly represented, while the appellant relies on the decision of the Privy Council in *Malkarjun* v. *Narhari* (4) and on certain observations in *Kadir Mohideen Markkayar* v. *Muthukrishna Ayyar* (5). In my opinion the decision in *Malkarjun* v. *Narhari* (4) has no bearing on the present case. In that case a party who was brought on as legal representative objected that he was not the legal representative, but the Court decided that he was; and their Lordships held that, in view of this decision which was within the jurisdiction of the Court, the sale could not be treated as a nullity even against the real representatives of the deceased who afterwards came forward. Their Lordships also held that, if the suit could be regarded as one to set aside the sale, it was barred by Article 12 of the Limitation Act.

On the other hand in *Khiarajmal* v. *Daim* (2), one Amirbaksh, a minor, the legal representative of one Naurez, was sued by his guardian one Alahnawaz, who was not his guardian in fact, and had not been appointed his guardian *ad litem*, and the Court held that Court sales in execution of the decrees obtained in these suits were not binding on the estate of the deceased Naurez or the minor, but were without jurisdiction and null and void. In the course of the judgment, their Lordships no doubt say that the absence from the record of one of the legal representatives of a deceased judgment-debtor is not always sufficient reason for disturbing judicial sales which otherwise have been properly conducted. "The Indian Courts," their Lordships say, "have properly exerised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors, were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors." But these observations do not cover such a case as the present in which according to the findings, the other widow who was brought on the record had ceased to have any interest in her husband's estate, and the sale itself was a fraudulent one. An endeavour has been made to distinguish that case from the present, on the ground that the decrees themselves were nullities owing to the minor defendant not having been properly represented, whereas in the present case the decrees were duly obtained against the deceased judgment-debtor. The still more recent decision of their Lordships in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3) shows that there is no substance in this distinction. In that case, as in the present, the suit was brought to declare the nullity as against the plaintiff of certain sales in execution of decrees against a deceased person, in which the minor plaintiff had been brought on as legal representative of the deceased judgment-debtor.

In two instances she had been represented by a woman who, as such, was not qualified to act as guardian *ad litem*, and in the third by another person whose interests were adverse.

Their Lordships held that the plaintiff had never been a party to any of these suits in the proper sense of the term. They further held that a minor brought on in this defective manner was not a party to the suit within the meaning of section 244—now section 47—Civil Procedure Code, and did not come within the operation of that section.

It follows from this decision that the minor here, who had no guardian *ad litem* at all, was not a party to the suit in which the sale was made, and that she was entitled to bring the present suit to declare it not binding without regard to the provisions of section 47, Civil Procedure Code. It follows also from the two decisions last mentioned that the plaintiff, not having been a party to that suit and not having been sufficiently represented by any one who was a party, seeing that the other widow had ceased to have any interest in the estate, the sale was not binding on her, and does not require to be set aside. What has been already said disposes of the

(3) 3 Ind. Cas. 864; 31 A. 572 (P. C.); 6 A. L. J. 822; 6 M. L. T. 279; 13 C. W. N. 1182; 10 C. L. J. 318; 11 Bom. L. R. 1225; 36 I. A. 168.

(4) 25 B. 337 (P. C.); 5 C. W. N. 10; 10 M. L. J. 368; 2 Bom. L. R. 927; 27 I. A. 216.

(5) 26 M. 230; 12 M. L. J. 368.

question of limitation as the new Article 166 and Article 12 are alike inapplicable, and the suit which was instituted within three years of the plaintiff's attainment of majority is not barred. The appeal is dismissed with costs.

SADASIVA AIYAR, J.—The 3rd defendant is the appellant. The plaintiff is the principal respondent. The material facts might be shortly stated thus: -

The plaintiff is the 2nd widow of the judgment-debtor in Original Suit No. 559 of 1903. The decree in that suit was transferred from the Vizianagaram District Munsif's Court to the Rajam District Munsif's Court for execution. The Rajam District Munsif's Court on the application of the decree-holder (the present 1st defendant) allowed execution against the plaintiff (junior widow) and the 2nd defendant (senior widow). Under section 234 of the old Code (section 50, clause 1, of the present Code), it was the Court which passed the decree to which the application by the decree-holder to execute the decree against the widows of the judgment-debtor ought to have been made and it is that Court which ought to have passed the order allowing execution. However, the Rajam District Munsif's Court somehow passed the order.

Another defect in that order was that, while the two widows jointly represented the estate of the deceased judgment-debtor (each of them representing half the said interest) the decree-holder, admitting this fact and knowing that the plaintiff (junior widow) was a minor, represented to the Rajam District Munsif's Court that she was a major, brought her on record as a major, and conducted execution proceedings against her and brought to sale the plaint properties including her moiety of the interest therein as if she was a major. The 3rd defendant purchased the two moieties of the two widows in the Court-auction sale, he also knowing that she (the plaintiff) was a minor. The purchaser (3rd defendant) and the decree-holder (the 1st defendant) were also guilty of some other fraudulent acts (as found by the lower Appellate Court) in connection with this Court-auction sale.

The sale took place on 19th October 1906 and it was confirmed on the 23rd January 1907. The present suit was brought on the 13th March 1909 praying for the following reliefs: (*a*) that the Court-auction sale of 19th October 1906 may be set aside, (*b*) that it may be declared invalid, (*c*) that such further or other reliefs might be granted, (*d*) that costs might be awarded.

The lower Courts have granted the reliefs prayed for by the plaintiff. I ought to have mentioned that the plaintiff asked for the above reliefs, not by a plaint in a regular suit, but by an application put in under section 47 of the Civil Procedure Code, which application was converted into a suit by the District Munsif's Court of Rajam.

So far as the merits are concerned, I need only say that on the findings of the lower Appellate Court the plaintiff was entitled to a decree, as the Court-auction sale was brought about by the fraud of the decree-holder and the Court-auction purchaser--a fraud having two branches, one directed against the plaintiff, the junior widow of the judgment-debtor, the other directed against the executing Court, which was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court-auction purchaser in anther suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down. The plaintiff also relied on the contention that the District Munsif's Court of Rajam had no jurisdiction to allow execution against her as the legal representative of her husband, as that Court was not the Court which passed the decree. Having regard, however, to the decision of Benson and Miller, JJ., in *Thamboo Pillai* v. *Sriramulu Naidu* (6), to the effect that an order of the executing Court allowing execution against the legal representatives of the judgment-debtor is not void, in other words, that the defect of jurisdiction in the executing Court is not such a defect as makes its order wholly ineffectual, I do not think that the plaintiff is entitled to succeed on that technical ground alone.

Another ground on which the plaintiff (respondent) asks us to uphold the decision of the lower Court is that as the plaintiff was not represented by a guardian in the execution proceedings, she was no party at all to the proceedings and the sale thereunder, that it is only a person who was a

(6) 17 M. L. J. 300.

party to the execution proceedings that is obliged to set them aside and that a person in the position of a stranger to the proceedings need only obtain a declaration that the proceedings have not affected her rights. Though the plaintiff also prayed in her plaint for setting aside the sale, that prayer may be treated as a surplusage and the suit may be treated as a mere suit for a declaration of the invalidity of the sale as againt the plaintiff's rights in her husband's properties.

In answer to this contention of the plaintiff, the appellant urged that according to the decision of the Privy Council in *Malkarjun* v. *Narhari*(4), the legal representative of a deceased judgment-debtor ought to have the execution sale set aside by proper proceedings, even though he was not made a party to the execution proceedings and even though a wrong party has been joined as such legal representative; that on similar reasoning, a minor who was brought in as legal representative, but for whom a guardian was not appointed, must also have the sale set aside by proper proceedings and should not be allowed to treat it as invalid as against her without a positive cancellation of the sale and that this rule of law applies *a fortiori* in a case like the present where a co-widow, one of the legal representatives, was a major and was on the record. The rejoinder of plaintiff to this contention of appellant is that though, in the absence of fraud or collusion, where a Court and a decree-holder treat a person who is not the legal representative of the deceased judgment-debtor, as such legal representative or treat one of several legal representatives as the sole legal representative and conduct execution proceedings, such execution proceedings ought first to be set aside by the true legal representative or by those legal representatives who had not been added as such by proper proceedings, yet that rule does not apply to a case where the decree-holder and the Court did purport to bring in the proper legal representative (or one of the proper legal representives) who was a minor as representing repectively the whole (or a portion) of the estate of the deceased judgment-debtor, but had not put him or her properly on the record by appointing a guardian to act for him or her in the execution proceedings, and that this non-applicability of the rule laid down in *Malkarjun* v. *Narhari* (4) to such a case becomes more pronounced as in this case, it was through the decree-holder's fraud and not through his mere ignorance that the minor legal representative was not represented by a guardian. I think that this contention of the plaintiff in rejoinder ought to be accepted. In the Privy Council case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), not only the *decrees* obtained against a minor without a proper guardian having been appointed for her, but even Court-auction sales held against the interests belonging to a minor legal representative (among the several legal representatives of a deceased jugdment-debtor) were treated and declared invalid in the suit brought by the said legal representative. Mr. V. Ramesam, who partly argued the appellant's case with acuteness and persistence, contended that that case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), did not decide that even such a minor legal representative need not have the sale set aside by proper legal proceedings and need only sue for the declaration of the invalidity of the Court-auction sales as against her interests. I have carefully read through that judgment. In the Court of first instance in that case, the suit seems to have been brought (see the report at page 572) for a declaration that the decrees and sales were invalid and also for the relief that they should be set aside so far as the plaintiff was concerned. Thus, as in the present case, there seem to have been prayers for a declaration of invalidity and also for setting aside. It is not, of course, surprising that plaintiffs in such cases are not clear in their own minds as to whether there is a necessity for a positive cancellation through Court of such sales and decrees or whether mere declaration will do, when learned gentlemen of the Bar are able to put forward plausible arguments for both views. In the present case the plaintiff has been careful to add also a prayer for "further and proper reliefs which the Court may deem fit." In that Privy Council case in *Rashid-un-Nisa* v. *Muhammad Ismail Khan* (3), the Subordinate Judge seems to have given both the reliefs (see page 575)

which reliefs are, however, spoken of by the reporter as "the relief she" (the plaintiff) "claimed." Their Lordships of the Privy Council do not make any definite pronouncement on the question whether the sales were *void* as against the plaintiff and need not, therefore, be set aside and whether, therefore, a mere declaration of the invalidity will do or whether they were *only voidable* by the plaintiff as regards her interests and whether, therefore, she should ask in the suit for a relief as to their cancellation. At page 583, their Lordships simply restore the decree of the Subordinate Judge.

While in the case in *Malkarjun* v. *Narhari* (4) the estate of the deceased judgment-debtor could be treated (owing to the wrong order of the Court which had jurisdiction to pass that order) as sufficiently represented in execution proceeding by the wrong legal representative, and hence that the right legal representative should have the sale set aside by taking proper proceedings and could not treat such a sale as completely void, a legal representative who was a minor not represented by a guardian and who could, therefore, not act at all in the proceedings for the protection of the interests of the estate, should be treated as *no party at all to the proceedings*, that the interest in the estate representated by her should also be treased as not put in a position to be legally dealt with by the proceedings in the executing Court and that such a minor legal representative need not bring a suit to have execution proceedings set aside and might properly content herself with a prayer for declaration of the invalidity of the execution proceedings as against her and as against the interests she possessed in the deceased judgment-debtor's estate.

I have to deal finally with the contention that the plaintiff's only remedy was by an application under Order XXI, rule 90 (old section 311), of the Civil Procedure Code to have the execution sale set aside and that that application is barred by limitation as not having been brought within the 30 days allowed for that purpose by Article 166 of the Limitation Act. As I have remarked before in this case, an application was put in by the plaintiff under section 47 of the Civil Procedure Code and this suit arose out of the transformation of that application into a plaint. Before section 311 of the Civil Procedure Code was amended and re-enacted as Order XXI, rule 90, of the Civil Procedure Code, applications to set aside execution sales for fraud were treated as coming under section 244, and not under section 311. By the amended provisions in Order XXI, rule 90, an application to set aside an execution sale for fraud was put on the same footing as an application to set aside an execution sale *on the ground of material irregularity*. It seems no doubt hard upon a judgment-debtor whose properties have been sold for a song by the fraud of the decree-holder, that he should be compelled to come in within 30 days though he might not have known of the fraud till after the 30 days had expired. Section 18 of the Limitation Act would not help him in getting an extension of the 30 days unless, after the date of the fraudulent sale, the decree-holder and the purchaser kept him by fraud from the knowledge of his right to make an application, especially where the Court-auction purchaser has joined the decree-holder in bringing about a fraudulent sale. It does seem a denial of justice to hold that the judgment-debtor should apply within 30 days of the sale to have it set aside, but I do not see my way to get over the plain words of Article 166 of the Limitation Act and I feel myself constrained to hold that if this suit is treated as an application to set aside the sale as distinguished from a suit for a declaration of the invalidity of the sale as against the plaintiff's rights, it must be treated as barred by limitation. So far as the suit is for the declaration of the invalidity of the sale, it is of course not barred by limitation. The decretal portion of the judgment of the District Munsif (see page 15 of the printed pleadings) and the decree of the District Munsif (see page 35) merely give such a declaration and there is no decree directing the sale to be set aside and hence the decree seems to me to be quite correct. As regards those hard cases which I just now referred to, if the fraud was only on the part of the decree-holder and not of the Court-auction purchaser, I think the Legislature intended that a *bona fide* Court-auction-purchaser should be protected

after 30 days, and that an application to set aside the sale should be brought within 30 days of the sale, even though the judgment-debtor was ignorant of the sale and of the decree-holder's fraud which brought about the sale. The judgment-debtor in such a case ought to be left to his remedy for damages caused to him by the decree-holder's fraud.

The case where both the decree-holder and the Court-auction purchaser have been guilty of fraud raises a question of greater difficulty and nicety. Is it reasonable to hold that even in such a case the judgment-debtor should only sue them for damages for the fraud after the expiry of the 30 days and cannot get back his property which had been sold in the Court auction through the fraud of both the decree-holder and the purchaser? After anxious consideration and with great diffidence I am inclined to hold that the judgment-debtor even in such a case cannot apply under Order XXI, rule 90, after the expiry of the 30 days for setting aside tha sale. As regards the relief for the setting aside of the sale, the procedure pointed out by the Legislature is only by an application under Order XXI, rule 90. It may be that other appropriate reliefs, which in justice are due to the judgment-debtor to get rid of the effects of the fraud practised by the Court-auction purchaser, may be open to him by instituting a suit praying for such other reliefs. I do not wish to hold that the Courts are powerless to imagine, invent, and grant other appropriate reliefs in such cases. It may be that the Court without setting aside the sale can give an injunction to the Court-auction purchaser to reconvey the property to the judgment-debtor. Such injunction would have an effect similar to the effect of a decree for specific performance of a contract to sell. The hands of Courts of Justice are not tied in these matters simply because, to support the grant of a particular appropriate relief, no exact precedent could be quoted. As regards a suit for such other appropriate reliefs that suit would be governed by Article 95 of the Limitation Act, which gives three years from when the fraud becomes known to the party wronged. In the result I would also dismiss the appeal with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 15 OF 1909-10 OF BENARES DISTRICT.

November 26, 1910.

Present:—Mr. Porter, S. M., and Mr. Baillie, J. M.,

SHAHDEO—APPELLANT

versus

MAHARAJA OF BENARES—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 22—Succession—Collateral sharing in cultivation in part of holding, right of, to inherit whole holding.

A person who shares in the cultivation of any part of a holding shares in the cultivation of the holding and is entitled to inherit the entire holding.

Second appeal from an order of the Commissioner of the Benares Division, dated the 4th May 1910, reversing that of the Assistant Collector in a case of ejectment.

JUDGMENT.

BAILLIE, J. M., (*November 7th*, 1910).—The facts are undisputed. Appellants are collateral relatives of the deceased tenant and shared with him in the cultivation of one of the numbers included in the holding at the time of his death. The other numbers are in the possession of the mortgagees. The Commissioner has held that the deceased tenant's interest in the holding devolved on the appellants in regard to the one number which was in their cultivation, and did not devolve in regard to those numbers which were cultivated by the mortgagees. In this finding the Commissioner has taken a view contrary to that which is usually accepted. It appears to me that a person who shares in the cultivation of any part of a holding shares in the cultivation of the holding and that the holding must be dealt with as a whole. I would find, therefore, that the interest of the deceased tenant has devolved on the appellant and that he is not liable to ejectment from any part of the holding as a tenant holding from year to year.

I would allow the appeal with costs on respondent.

PORTER, S. M.—I concur.

Appeal allowed.

CALCUTTA HIGH COURT.
CRIMINAL REFERENCE No. 36 OF 1914.
CRIMINAL APPEAL No. 983 OF 1914.
January 14, 1915.
Present:—Mr. Justice Fletcher and
Mr. Justice Beachcroft.
EMPEROR—PROSECUTOR
versus
MOHAR ALI SHEIKH—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 374, 376 (b)—Reference—Capital charge—Accused undefended—Re-trial, order of—High Court, power of.

When an accused appears before a Judge on a Capital charge, he ought not to be allowed to go undefended, the custom being for the Judge to appoint or request any member of the Bar to conduct the defence of the accused.

Under section 376 (*b*), Criminal Procedure Code, the High Court has jurisdiction to order a new trial on the same or an amended charge.

Reference made by the Additional Sessions Judge of Mymensingh under section 374, Criminal Procedure Code.

Mr. *Orr* (Deputy Legal Remembrancer), for the Crown.

Babu *Birbhusan Dutt*, for the Accused.

JUDGMENT.—This case comes before us on a reference made by the learned Additional Sessions Judge of Mymensingh under the provisions of section 374, Code of Criminal Procedure, and also on appeal by the accused. The accused was tried before the learned Additional Sessions Judge with the aid of a Jury on two charges; *first* of all, with having murdered one Jamir Sheikh and *secondly*, with voluntarily causing hurt by a cutting instrument to one Kocha. The present case is one that has caused us considerable anxiety, because the accused was undefended before the learned Sessions Judge. That is a course which ought not to be adopted in cases where the accused is tried on a capital charge. There has been a practice long established and well-recognised that when an accused appears before the Judge on a capital charge, the Judge is accustomed to request a member of the Bar who practises before him to undertake the defence of the accused. That obligation has, so far as I am aware, always been recognized by the profession, who always have willingly undertaken the defence of the accused so charged at the request of the presiding Judge. However, the learned Judge in the present case did not appoint or request any member of the profession to conduct the defence of the accused, the result being that the case has been tried practically *ex parte* and the difficulties that appear on the evidence have not been cleared up in the course of the cross-examination either by the accused himself or by the learned Judge. The evidence, as it stands on the record, is such that we are unable to confirm the sentence passed on the accused. What the points of difficulty transparent to any person who has any knowledge of the value of evidence are, it is not our duty to state at present nor do we think it right that at the present moment we shall enumerate which are the points that have pressed upon us. The only question is, what ought we to do in the present circumstances? If the story relied upon by the prosecution be true, an exceedingly cruel murder has been perpetrated and public safety requires that, if possible, the person who has perpetrated that murder should be brought to justice. Section 376 (*b*), Code of Criminal Procedure, gives us jurisdiction to order a new trial on the same or an amended charge. That being so, we consider that in this case, we are bound to send the case back to the learned Judge with a direction that the accused be re-tried on the same charges that have already been framed against him and we would request the learned Judge to see that, in the new trial, some gentleman represents the accused before him.

We, therefore, decline to confirm the sentence of death passed on the accused and send the case back to the learned Judge for the accused being re-tried.

Re-trial ordered.

MADRAS HIGH COURT.
CRIMINAL REVISION CASE No. 438 OF 1914.
CRIMINAL REVISION PETITION No. 368 OF 1914.
March 15, 1915.
Present:—Mr. Justice Ayling.
THE MAHARAJA OF VENKATAGIRI—PETITIONER
versus
AMBARKANA SRINIVASA ROW—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 146—Attachment of property—Duration of attachment—Adjudicatian of rights of parties by competent Court—Magistrate, duty of, to withdraw attachment.

JAI DEBI KUAR *v.* EMPEROR.

An order of attachment of property under section 146 of the Criminal Procedure Code remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto or of the person entitled to possession.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate of Gudur, dated 28th February 1914, in Miscellaneous Case No. 3 of 1910.

Mr. *S. Subramania Iyer*, for the Petitioner.

Mr. *P. R. Grant*, for the Public Prosecutor.

Mr. *I. V. Ramanuja Row*, for the Respondent.

ORDER.—An order of attachment of property under section 146 of the Criminal Procedure Code remains in force until withdrawn, but it is the duty of the Magistrate to withdraw it and release the attachment, as soon as it is brought to his notice that a competent Court has determined the rights of the parties thereto, or the person entitled to possession The only question is whether that has been done in the present case. The finding of the District Judge on the first issue in Original Suit No. 3 of 1902 concludes the question of title between the parties to that suit. The fact that he was unable to determine the question of possession and that this Court remarked in its appeal judgment that defendant's (the present petitioner's) evidence of *enjoyment* was equally weak, is immaterial.

The continuance of the attachment is illegal and it should be released at once.

Ordered accordingly.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 146 OF 1915.

April 21, 1915.

Present:—Justice Sir P. C. Banerji, KT.

JAI DEBI KUAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 500—Defamatory statement—Publication of libel.

The accused made certain defamatory statements against a Government Official in her petition to the Lieutenant Governor, and on inquiry she repeated the same statements before two Magistrates on different occasions:

Held, that the statements made before the two Magistrates were the publication of the original defamatory statements made in the memorial to the Lieutenant-Governor and the accused was guilty of three separate publications of the libel.

Application in revision against an order of the Sessions Judge of Moradabad.

Mr. *S. C. Mukerji*, for the Applicant.

The *Assistant Governme l Advocate*, for the Crown.

JUDGMENT.—This is an application for the revision of the order of the learned Sessions Judge of Moradabad, affirming the conviction of the applicant for an offence under section 500 of the Indian Penal Code. It appears that the applicant, *Musammat* Jai Debi, presented an application to His Honour the Lieutenant-Governor in which she charged the complainant, Mr. Krishna Chandra Joshi, Deputy Collector, with instigating her opponent, Kaliyan Rai, to bring false charges against her. An inquiry was ordered and Mr. Nanavati, the Collector of Budaun, sent for the applicant and she appeared before him and repeated what she had said in her memorial, and added that Mr. Krishna Chandra Joshi had asked for a bribe from her which she had refused to pay. A further inquiry was held by Mr. Ingram, the successor of Mr. Nanavati, and before him also she apparently repeated what she had stated in her memorial to His Honour the Lieutenant-Governor. It was in regard to these statements that she was prosecuted, and she has been convicted on three separate charges, namely (1) of the statement made in the memroial to His Honour the Lieutenant-Governor, (2) the statement made before Mr. Nanavati, and (3) the statement made before Mr. Ingram.

It is urged that she could not be convicted on three different charges, because the state-

ments made before Mr. Nanavati and Mr. Ingram cannot be demeed to be a publication of the libel inasmuch as she made the statements in answer to question put to her. I am unable to agree with this contention. There was no obligation on the applicant to make any statement to Mr. Nanavati imputing dishonesty and bribery to Mr. Krishna Chandra Joshi, and there was equally no obligation on her to make defamatory statements in regard to that officer before Mr. Ingram. The statements made by her were clearly publications of the original defamatory statement made in the memorial to the Lieutenant-Governor and there were thus three separate publications of the libel. The case does not fall within any of the exceptions to section 499 of the Indian Penal Code. As the learned Sessions Judge has pointed out, exception (2) has no application as there was no expression of opinion. As to exception (8), there was nothing to show that she acted in good faith. The applicant was, therefore, rightly convicted on three different charges, and I see no reason to interfere with the decision of the Court below.

I accordingly dismiss the application.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION No. 113 OF 1915.

March 11, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

EMPEROR—APPLICANT

versus

GANGUA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 339—Approver—Pardon forfeited—Power of Sessions Judge to direct prosecution—Plea not taken before Committing Magistrate taken before Sessions Judge, legality of.

In a case of dacoity one of the accused *G* was given a conditional pardon. The Sessions Judge, being of opinion that he had not spoken the truth, directed his prosecution under section 397 of the Penal Code. *G* pleaded pardon before the Sessions Judge, but not before the Magistrate:

Held, that the Sessions Judge had no authority to direct the prosecution of *G* on any specific charge and that if he came to the conclusion that the approver had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of his prosecution. [p. 324, col. 1.]

Emperor v. *Kothia*, 30 B. 611; 8 Bom. L. R. 740 4 Cr. L. J. 346; *Kullan* v. *Emperor*, 2 Ind. Cas. 343. 9 Cr. L. J. 571; 32 M. 173; *Aligiriswami Naicken. In re*, 5 Ind. Cas. 831; 7 M. L. T. 121; 11 Cr. L. J. 254, (1910) M. W. N. 5; 33 M. 514; *Emperor* v. *Aban. Bhushan Chuckerbutty*, 8 Ind. Cas. 721; 11 Cr. L. J. 702; 37 C. 845, referred to.

Held, further, that *G* was entitled to plead pardon before the Sessions Judge, although he had not done so before the Committing Magistrate. [p. 324, col. 2.]

Criminal revision against an order of acquittal of the Sessions Judge of Mainpuri.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—In this case it appears that one Gangua was suspected of having taking part in a serious dacoity, committed at a village called Manpore in the Etawah district on the 23rd of October 1913. He made a confession before a Magistrate and received a conditional promise of pardon. He was produced before the Sessions Judge as a witness against Abadua and others (Sessions Trial No. 8 of 1914, Etawah Sessions). The learned Sessions Judge who tried that case came to the conclusion that Gangua had not given true evidence. We have examined the judgment in that case, and in some points we find it a little difficult to follow the reasoning of the learned Sessions Judge. Apparently, however, he was of opinion that Gangua had in any case, whether he was actually concerned in the dacoity or not, made false statements regarding a certain pair of earrings produced as one of the Exhibits in the case. He concluded his order, after directing the acquittal of the accused persons then before him, with the following words:—"The approver has not spoken the truth and he will, therefore, forfeit his pardon. The confession made by him may be sufficient for his own conviction on the original charge of dacoity, though it is valueless without corroboration as against his associates. I direct the prosecution of Gangua on a charge under section 397." In accordance with this order proceedings were taken against Gangua and he was committed for trial. In the Committing Magistrate's Court Gangua did not plead the pardon, and it was apparently taken for granted that the Sessions Judge's order of May 26th, 1914, quoted above, was conclusive on this point. When Gangua was placed on his trial before the successor of the learned Sessions Judge who had passed

the order of May 26th, 1914, he did plead that he had not broken any of the conditions on which pardon had been tendered him and, therefore, had not forfeited his pardon. Upon this the learned Sessions Judge appears to have called upon the Pleader employed to conduct the prosecution in that particular case to state what evidence he relied upon in order to prove that Gangua had forfeited his pardon. He made a note of various statements on this point made by the Pleader and thereupon passed an order, accepting the prisoner's plea that he had not broken the conditions of his pardon, acquitting him and directing his immediate release. The record was called for by this Court on a perusal of the Sessions statements for the district of Etawah for the month of November 1914, and is before us in order that we may consider the propriety of the above proceedings.

We have examined a number of reported cases, in which the question of the change in the law effected by the substitution of the word "forfeited" for the word "withdrawn" in section 339 of the Code of Criminal Procedure has been considered by various High Courts. We may refer to *Emperor* v. *Kothia* (1), *Kullan* v. *Emperor* (2), *Aligiriswami Naicken, In re* (3), *Emperor* v. *Abani Bhushan Chuckerbutty* (4). We are satisfied that the Sessions Judge's order of May 26th 1914 was irregular and has given rise to the difficulties experienced by the Magistrate and the Sessions Judge in dealing with this matter. The Sessions Judge before whom Gangua gave evidence at the trial of Abadua and others had, no doubt, authority to pronounce his opinion as to the truthfulness or otherwise of the whole or any part of Gangua's evidence, apart from the question whether it was sufficient for the conviction of any of the accused persons then on their trial. If he came to the conclusion that Gangua had wilfully concealed anything essential, or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion, or possibly to suggest the propriety of Gangua's prosecution. He had no authority to direct the prosecution of Gangua on any specific charge. When the Committing Magistrate took up this matter it was open to Gangua to have pleaded his pardon in that Court, precisely as he did afterwards before the Court of Session. If he had done so, the Magistrate would have been bound to inquire into the matter, at least to the extent of satisfying himself that there was *prima facie* ground for holding that Gangua had forfeited his pardon, and to include in his commitment order a statement of the evidence on which he relied as establishing this fact. Probably the form of the order passed by the Sessions Judge at the trial of the case against Abadua and others prevented the committing Magistrate from looking at the matter from this point of view. When the case against Gangua came before the Sessions Court, Gangua was entitled to plead his pardon, and the Sessions Judge was right in recording the plea and in asking the Pleader, employed to conduct the prosecution, what evidence he intended to offer in disproof of the same. Ordinarily, in our opinion, the proper course to have followed in such a case would be, first of all, to have put in evidence the record of the statement made by Gangua as a witness at the former trial, together, if necessary, with evidence as to the identity of the person making that statement. In order to form an opinion whether in the course of that statement Gangua had given false evidence, or had wilfully concealed anything essential, it might very possibly have been necessary for the learned Sessions Judge to have recorded evidence in the case, or at any rate the evidence particulary bearing on the question of the recovery of the pair of earrings already alluded to. In passing an order of acquittal without taking any evidence, and without any withdrawal of the prosecution by a Public Prosecutor properly authorized to withdraw the same under section 494 of the Code of Criminal Procedure, the learned Sessions Judge adopted, in our opinion, an irregular procedure. At the same time, under the circumstances of this particular case, we are not disposed to interfere. The fact of the matter is, as already pointed out, that the Courts concerned, and we have no doubt also the District Magistrate, were

(1) 30 B. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346.
(2) 2 Ind. Cas. 343; 9 Cr. L. J. 571; 32 M. 173.
(3) 5 Ind. Cas. 831; 7 M. L. T. 121; 11 Cr. L. J. 254; (1910) M. W. N. 5; 33 M. 514.
(4) 8 Ind. Cas. 721; 11 Cr. L. J. 702; 37 C. 845.

placed in a difficulty by the irregular order passed by the Sessions Court on May 26th, 1914. Apparently, in the opinion of those responsible for conducting the prosecution, Gangua had not given false evidence, either in respect of this pair of earrings or in any other matter of importance. Consequently when the learned Pleader instructed by the District Magistrate was called upon to inform the Sessions Judge what evidence there was on which he relied as showing that Gangua had forfeited his pardon, he was unable to state that evidence to the satisfaction of the Sessious Court. It would seem that this prosecution ought never to have been instituted and would never have been instituted but for the Sessions Judge's order of May 26th 1914.

For these reasons we decline to interfere in this matter, and merely order that the record be returned. If Gangua is under arrest he should be at once released ; otherwise his security is hereby discharged.

Record returned.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION PETITION NO. 95 OF 1914.

June 15, 1914.

Present:—Mr. Stanyon, A. J. C.

SAIYYAD RAHIM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Master and servant—Criminal acts of servants—Master, liability of, conditions of—Forest Act (VII of 1878), s. 25 (d), applicability of—Licensee under Forest Act, liability of, for agent's acts—Statute, construction of—"Intention of the Legislature", meaning of.

A master is not criminally responsible for the acts of his servants, unless he expressly commands or personally co-operates with them or unless the criminal liability is imposed by Statute upon him as regards the acts or omissions of his servants. [p. 326, col. 2, p. 327, col. 1.]

In the cases where a master is held liable for the criminal acts of his servants under a Statute, the question is whether upon the true construction of the Statute in question, the master is intended to be made criminally liable for the acts of his servants done within the scope or in the course of their employment. [p. 327, col. 2.]

A licensee under the Indian Forest Act (VII of 1878) would be liable *criminaliter* for every act of his agent, done in carrying on the business delegated to him, which amounts to a breach of the condition of the license made criminally punishable by the Act or any rule thereunder. [p. 328, col. 1.]

Where the owner of a certain number of cattle entrusted them to a grazier who took them into a forest reserve to afford them better pasturage:

Held, that the owner was not criminally liable, though he was civilly liable. [p. 328, col. 2.]

Held, further, that the words of section 25 (*d*) of the Indian Forest Act (VII of 1878) clearly apply only to the person who does any of the acts mentioned therein. [p. 328, col. 2.]

Semble. Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts. [p. 327, col. 2.]

Nothing is to be regarded within a Penal Statute which is not clearly and intelligibly described in the very words of the Statute itself [p. 328, col. 2.]

The phrase "intention of the Legislature" cannot be extended to cover a speculative opinion as to what the Legislature probably would have meant although there has been an omission to enact it. [p. 329, col. 1.]

Criminal revision against the conviction and sentence passed by the Extra Assistant Commissioner and Magistrate, first Class, Chanda, dated the 23rd December 1913.

Mr. *M. R. Bobde*, for the Applicant.

Mr. *G. P. Dick*, for the Opposite Party.

JUDGMENT.—The facts of the case are beyond dispute. The applicant is the owner of a certain number of sheep and goats. He entrusted these animals to one Kanna,a grazier, who undertook to graze them together with sheep and goats entrusted to him by other persons for the same purpose. Kanna had also some animals of his own. The entire flock of about 115 sheep and goats was found on the 14th September 1913 grazing under the control of Kanna without license in a Government reserved forest. There is nothing to show that the present applicant instigated or connived at or permitted that trespass. He has been held criminally liable for the act of his grazier Kanna and fined Rs. 50. Against that conviction and sentence, which were arrived at by way of summary trial by a Magistrate of the first Class, the applicant has applied to this Court for revision, on the ground that he is not criminally responsible for the act of his agent or servant, the grazier. A Rule to showcause issued to the District Magistrate, who has responded thereto, and the learned Government Advocate has been heard in support of the conviction. His argument, shortly put, is this, that the accused is criminally liable for breaches of the Forest Law

committed by his servant, because he is under a statutory liability to see that his animals do not enter a reserved forest without a license. In other words this is claimed to be one of many exceptions to the general rule, that a master is not criminally liable for the acts of his servant, unless he expressly command or personally co-operate in them.

The learned District Magistrate is less confident of the soundness of the conviction. He writes:—

"I have little doubt but that the applicant connived at the illicit graz'ng of his cattle, and that his defence is false ; but in the absence of proof of his active connivance his criminal liability is somewhat doubtful. Such practices are very common in this and other districts, and it is advisable to stop them if it can be done. But the legal liability of the owner is not a settled fact."

(Apparently by "legal liability" the learned District Magistrate means "criminal responsibility").

On behalf of the accused reliance is placed upon a case which is directly in point, namely, the case of *Queen-Empress* v. *Kristnayyan* (1) in which it was held: "The owner of cattle found grazing in a forest reserve cannot be convicted under Madras Forest Act, section 21 (*d*), in the absence of evidence that he either pastured the cattle or permitted them to trespass in the reserve." The enactment above mentioned is in the same terms as section 25 (*d*) of the Indian Forest Act, which has been applied to this case. The latter makes punishable "Any person who, in a reserved forest, trespasses or pastures cattle, or permits cattle to trespass." On the other hand, filed with the record is an unreported case in which the Bombay High Court refused to interfere—without giving any reason for such refusal—with concurrent findings by the lower Courts convicting a master under section 25 (*d*) aforesaid for a trespass by his cattle into a forest reserve, though the immediate responsibility lay with his grazier. That Court, however, held in that case that there had been an overt act by the master, in that he had permitted a single boy of tender years to look after his cattle in the vicinity of the Government forests. In the present case, there is no allegation that there was any negligence by the applicant which contributed to the trespass, or that Kanna was not a competent grazier. Therefore, the Bombay case cannot be said to be in conflict with the Madras ruling and affords no authority for the proposition put forward by the learned Government Advocate in the present case.

The question is not free from difficulty. The general rule of law that a master is not criminally responsible for the acts of his servants, unless he expressly command or personally co-operate in them, is well established. In criminal cases they must each answer for their own acts, and stand or fall by their own behaviour (Compare Smith's 'Master and Servant,' 5th Edition, page 266, and authorities there cited). In *Cooper* v. *Slade* (2) Lord Wensleydale, in giving judgment, said: "I take the law to be clear that a man cannot be guilty by his agent of an illegal act, and be held responsible for that act, unless he has given the agent authority, express or implied, to do that illegal act. I know that the law of agency in such cases has been much extended by Committees of the House of Commons, but I take it to be a clear proposition of law that if a man employs an agent for a perfectly legal purpose, and that agent does an illegal act, that act does not affect the principal, unless a great deal more is shown: * * * * I conceive that the rule of law is * * * that *no man who is an agent for a legal purpose can make the principal responsible for an illegal act, unless the principal has in some way directly or indirectly authorized it.*". There is a general presumption that *mens rea*, and evil intention, or a knowledge of the wrongfulness of the act, or some blameworthy condition of mind, is an essential ingredient of every offence: *Sherras* v. *De Rutzen* (3),

(1) 15 M. 156; 1 Weir 763.

(2) (1857) 6 H. L. Cas. 746 at p. 793; 10 E. R. 1488; 27 L. J. Q. B. 449; 4 Jur. (N.S.) 791; 6 W. R. 461; 108 R. R. 292.

(3) (1895) 1 Q. B. D. 918; 64 L. J. M. C. 218; 15 R. 388; 72 L. T. 839; 43 W. R. 526; 18 Cox. C. C. 157; 59 J. P. 440.

Coppen v. *Moore* (4); *Chisholm* v. *Doulton* (5). The mere fact that the master may be liable *civiliter* does not make him liable *criminaliter* for an offence, illegal act or tort by his servant: *Laycock's* case (6); *Sanderson* v. *Baker* (7); *Woodgate* v. *Knatchbull* (8); *Bagge* v. *Whitehead* (9).

This general rule of English Law is also the law of British India, and has been followed in these Provinces: *Suffer Ally Khan* v. *Golam Hyder Khan* (10); *Uttam Chand* v. *Emperor*(11); *Local Government* v. *Lakhmichand* (12).

But there are exceptions to this general rule. In some cases criminal liability is imposed by Statute upon the master as regards the acts or omissions of his servants, both in England and in India. In some enactments provision to that effect is expressly made *e. g.*, the Pawnbrokers Act, 1872 (35 and 36 Vic., Chapter 93), section 8, whereunder anything done or omitted by the servant, apprentice, or agent of a pawnbroker, in the course of, or in relation to, the business of pawnbroker; shall be deemed to be done or omitted (as the case may be) by the pawnbroker; the Merchant Shipping Act (39 & 40 Vict., Ch. 80), section 28, whereof imposed a penalty on any owner of a British ship who should allow the ship to be overloaded; and sections 154 and 155 of the Indian Penal Code, whereby owners and occupiers of land are made criminally responsible for omissions by their servants and agents, even though they may be ignorant of such defaults: *Queen-Empress* v. *Prayag Singh*(13), followed in *Kazi Zeanuddin Ahmed* v. *Queen-Empress* (14). In the cases of other enactments, principals have been held criminally liable for the illegal acts of their agents by virtue of constructions placed by the Courts on the language of the Statutes concerned. But in all such cases the question is whether upon the true construction of the Statute in question, the master is intended to be made criminally liable for the acts of his servants, done within the scope or in the course of their employment. The master is relieved from criminal responsibility if he shows that he acted in good faith and had done all that was reasonably possible to do to prevent the commission by his agents and servants of offences against the Statute. Similarly, if a servant does that for which he is not employed, or if he acts for his own personal benefit, the master will not be liable: *Boyle* v. *Smith* (15); *Anglo-American Oil Company, Limited* v. *Manning* (16). License cases form a class by themselves in which the master is generally held responsible by reason of his contractual undertaking to use his license in a particular manner and to avoid acts which are penal and on the occurrence of which, the licensee becomes liable to the penalties imposed: *Massey* v. *Morris* (17); *Brooks* v. *Mason* (18); *Emary* v. *Nolloth* (19); *Mullins* v. *Collins* (20); *Commissioners of Police* v. *Cartman* (21); *Queen-Empress* v. *Tyab Alli* (22): *Emperor* v. *Haji Shaik Mahomed* (23); *Empress* v. *Shrikissen* (24); *Emperor* v. *Rustomji Pestonji* (25). Statutes passed for the benefit of the public health and sanitation are construed in the same way as licensing Acts: *Brown* v. *Foot* (26)—a case under the Sale of Food and Drugs

(4) (1898) 2 Q. B. D. 306; 62 J. P. 453; 67 L. J. Q B. 689; 78 L. T. 520; 14 T. L. R. 414; 46 W. R. 620.

(5) (1889) 22 Q. B. D. 736; 58 L. J. M. C. 133; 60 L. T. 966; 37 W. R. 749; 16 Cox. C. C. 675; 53 J. P. 550.

(6) Latch 187.

(7) 3 Wils. 309.

(8) 2 T. R. 148; 1 R. R. 449; 100 E. R. 80.

(9) (1892) 2 Q. B. D. 355; 61 L. J. Q. B. 778; 66 L. T. 815; 40 W. R. 472; 56 J. P. 548.

(10) 6 W. R. Cr. 60.

(11) 15 Ind. Cas. 1007; 39 C. 344; 16 C. W. N. 551; 15 C. L. J. 401; 13 Cr. L. J. 591.

(12) 8 C. P. L. R. 19.

(13) 12 A. 550; A. W. N. (1890) 176.

(14) 28 C. 504; 5 C. W. N. 771.

(15) (1906) 1 K. B. 432; 75 L. J. K. B. 282; 54 W. R. 519; 70 J. P. 115; 21 Cox. C. C. 84; 22 T. L. R. 200; 94 L. T. 30.

(16) (1908) 1 K. B. 536; 98 L. T. 570; 6 L. G. R. 299; 72 J. P. 35; 24 T. L. R. 215; 77 L. J. K. B. 205.

(17) (1894) 2 Q. B. 412; 63 L. J. M. C. 185; 10 R. 342; 70 L. T. 873; 42 W. R. 638; 7 Asp. M. C. 586; 58 J. P. 673.

(18) (1902) 2 K. B. 743; 72 L. J. K B. 19; 88 L. T. 24; 67 J. P. 47; 20 Cox. C C. 464; 51 W. R. 224; 19 T. L. R. 4.

(19) (1903) 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100; 52 W. R. 107; 67 J. P. 354; 20 Cox. C. C. 507; 19 T. L. R. 530.

(20) (1874) 9 Q. B 292; 43 L. J. C. 67; 29 L. T. 838; 22 W. R 297.

(21) (1896) 1 Q. B. 655; 65 L J. M. C. 113; 74 L. T. 726; 44 W. R. 637.

(22) 24 B. 423; 2 Bom. L. R. 52.

(23) 32 B. 10; 9 Bom. L. R. 1059; 7 Cr. L. J. 238.

(24) 7 C. P. L. R. 41.

(25) 1 N. L. R. 81; 2 Cr. L. J. 959.

(26) (1892) 66 L. T. 649; 61 L. J. M. C. 110; 17 Cox. C. C. 509; 56 J. P. 581.

Act, 1875; *Collman* v. *Mills* (27), under the Public Health Act, 1891. The same principle of construction is followed in respect of enactments dealing with revenue matters: *Attorney-General* v. *Siddon* (28). So also in the case of public nuisances, press libels and the like, where the object of the Legislature would be defeated if the person really responsible, whether as a licensee or vendor or custodian of the public health, comfort, or safety, could avoid responsibility by delegating to servants and agents the control of the licensed business, the sale of food or drugs, the carrying on of offensive or dangerous trades, the protection of revenue against smuggling, or the like. The principle governing all these cases is that by Statute or by contractual undertaking there is some *public* duty legally binding upon the master, for the breach of which a criminal liability is imposed on him, whether such breach is committed by him personally or by persons whom he chooses to employ in the discharge of that obligation: subject to this that the acts of the servants fall within the scope of their authority. If it is shown that the principal directed the agent to do the illegal act, or really meant he should so act, or afterwards ratified the illegal act, or that he appointed one to be agent to do both legal and illegal acts, to do everything in short which he might think proper to support the interests of the principal, then responsibility can be fastened on the principal: *Cooper* v. *Slade* (2). Applying this principle, I am perfectly clear that a licensee under the Indian Forest Act would be liable *criminaliter* for every act of his agent, done in carrying on the business delegated to him, which amounts to a breach of the conditions of the license made criminally punishable by the Act or any rule thereunder. But in the present case the applicant had not bound himself by any contractual obligation to use or abstain from using the reserved forests in a particular way or to perform any other duty for the breach of which by another, albeit his agent or servant, *criminal* responsibility could be imposed on him. It cannot be said that because he was under a general obligation to obey the Forest Law, therefore, he was also personally liable *criminaliter* to see that all his agents and servants obeyed it. For if this proposition were correct, the principal could be liable for every crime committed by his agent. The applicant was bound to see that his flock did not trespass on reserved forests: and he must be taken to have discharged that obligation when he entrusted the control of that flock to a grazier who was competent to keep the animals from committing such trespass. It is true that when the grazier took them into a forest reserve he did so for the benefit of the applicant, to afford them better pasturage. This fact makes the applicant liable *civiliter*, but I do not think it can be used to strain the law so as to impose criminal responsibility upon him.

The words of section 25 (*d*) of the Indian Forest Act clearly apply only to the person who does any of the acts mentioned therein. Supposing the language to be ambiguous, it must be construed in the manner most favourable to the liberties of subjects: *Reg.* v. *Bhista* bin *Madanna* (29). Nothing is to be regarded as within a Penal Statute which is not clearly and intelligibly described in the very words of the Statute itself: *Empress* v. *Kola Lalang* (30). It is for the Legislature, not the Court, to define a crime and ordain its punishment. It is unquestionably a reasonable expectation that if the Legislature had intended to fasten upon owners such responsibility as has been laid upon the applicant in this case—forming as it does an exception to the general rule of law that a person's criminal responsibility is confined to his own acts—it would not have left its intention to be gathered by mere doubtful inference, or have conveyed it in "cloudy and dark words" only, but would have made it manifest with reasonable clearness. The liability is expressly declared in the rules under which grazing licenses are issued by the Forest Department, and the tendency is to make clear by express words or necessary implication the exceptional cases where a principal is criminally responsible for offences committed by his agent without his knowledge and connivance. The phrase

(27) (1897) 1 Q. B. 396; 66 L. J. Q. B. 170; 75 L. T. 590; 18 Cox. C. C. 481; 61 J. P. 102.

(28) (1830) 1 C. & J. 220; 1 Tyr. 41; 9 L. J.(o. s.) Ex. 7; 35 R. R. 701.

(29) 1 B. 308 at p. 311.

(30) 8 C. 214; 10 C. L. R. 155.

"intention of the Legislature" cannot be extended to cover a speculative opinion as to what the Legislature probably would have meant although there has been an omission to enact it: *Salomon* v. *Salomon and Company* (31).

For these reasons I think that *Queen-Empress* v. *Kristnayyan* (1) was correctly decided, and following it I hold that the conviction of the applicant in this case was illegal. It is, therefore, set aside, and the fine, if paid, must be refunded.

Conviction set aside.

(31) (1897) A. C. 22; 65 L. J. Ch. 35; 75 L. T. 426; 45 W. R 193; 4 Manson, 89.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 155 OF 1913.
CRIMINAL REVISION PETITION No. 133 OF 1913.
August 1, 1913.

In re SUBRAMANIA AYYAR—ACCUSED—PETITIONER.

Criminal Procedure Code (Act V of 1898), s. 530 – Bench of Magistrates—Conviction—Some not having heard evidence, effect of.

A conviction by a Bench of Magistrates some of whom have not heard the evidence is vitiated and must be set aside.

Petition, under sections 435 and 439 of the Code of Criminal Procedure (Act V of 1898), praying the High Court to revise the judgment of the first Class Sub-Divisional Magistrate of Mayavaram, in Criminal Appeal No. 3 of 1913 (Special Tribunal No. 620 of 1912 on the file of the Stationary Second Class Magistrate of Mayavaram).

Mr. *T. S. Rajagopala Ayyar*, for the Petitioner.

Mr. *J. C. Adam*, for the Public Prosecutor, on behalf of the Government.

ORDER.—In this case the petitioner was convicted by a Bench of five Magistrates, one of whom had not heard all the evidence. This vitiates the conviction—*vide* section 530 of the Criminal Procedure Code, and *Hardwar Singh Lal* v. *Khega Ojha* (1) [followed in *Queen-Empress* v. *Basappa* (2)] and *Damri Thakur* v. *Bhowani Sahoo* (3). The conviction and sentence are set aside, and a re-trial is ordered.

Re-trial ordered.

(1) 20 C. 870.
(2) 18 M. 394; 2 Weir 17.
(3) 23 C. 194.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 275 OF 1915.
April 30, 1915.

Present:—Mr. Justice Piggott.

RAM RAJA DAT—APPELLANT
versus
SHEO DAYAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (6) – Sanction to prosecute—Superior Court—Jurisdiction to re-consider whole case.

A Court of superior jurisdiction whose jurisdiction is invoked under section 195 (6) of the Code of Criminal Procedure should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below, it should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts. [p. 329, cols. 1 & 2.]

Appeal, under section 195, Criminal Procedure Code, against an order of the Sessions Judge, Banda, dated the 27th February 1915, directing the prosecution of the appellant under section 193, Indian Penal Code.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *R. K. Sorabji*, for the Respondent.

JUDGMENT.—This is an application under the sixth clause of section 195 of the Code of Criminal Procedure, asking this Court to revoke an order passed by the Sessions Judge of Banda sanctioning the prosecution of one Ram Raja Dat for having committed the offence of giving false evidence in a deposition made by him on the 12th of August 1914 in the Court of a Magistrate subordinate to that Court. The case came before the Sessions Judge in appeal and hence he has dealt with the application for sanction. He was fully empowered to do so; but it is worth noticing that the evidence given by Ram Raja Dat was believed and acted upon by the Magistrate who heard it. I wish also to note that I look upon an application under section 195, clause (6), as standing on a very different footing from an application in revision. The right conferred by the clause above mentioned may not be exactly a right of appeal, but it is strongly analogous to such right. I think the Legislature intended that a Court of superior jurisdiction whose jurisdiction was invoked under section 195, clause (6), of the Code of Criminal Procedure, should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of

the Court below, should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts. The proceedings out of which the matter now before me has arisen have been of considerable duration and occupied the attention of several Courts. It appears that a dispute arose on the death of one *Musammat* Beni Bai, who was a tenant holding lands as an ex-proprietor, as an occupancy tenant and also as a tenant-at-will. The dispute which arose on her death was as to whether she had or had not left any heir entitled to succeed to her interests as ex-proprietary tenant, occupancy tenant and non-occupancy tenant under the provisions of the Agra Tenancy Act (Local Act II of 1901). The applicant Ram Raja Dat was a collateral of Beni Bai and was a possible successor to her tenancy, provided that he had shared in the cultivation of the tenancy at the time of the lady's death. In the village papers he stood recorded as a sub-tenant of the holding. A dispute between Ram Raja Dat and the *zemindar* Chaudhri Baldeo Prasad, was fought out in the Court of an Assistant Collector of the first Class upon an application for mutation of names under the Land Revenue Act. The enquiry resulted in a clear finding in favour of Ram Raja Dat, whose name was ordered to be recorded in place of *Musammat* Beni Bai deceased in all *khalas*, and with same rights as the deceased lady. That order was never appealed against, nor does it appear that any attempt has been made up to the present to get the question re-litigated by means of any proceedings under the Agra Tenancy Act. What happened was that the Assistant Collector formed a very unfavourable opinion with regard to certain evidence given by Sheo Dayal, *patwari* of the village, in the course of the inquiry before him. He directed the prosecution of Sheo Dayal upon charges of forgery and of giving false evidence. It was before the Magistrate enquring into these charges that Ram Raja Dat made a statement in respect of which it is now sought to prosecute him. Sheo Dayal was convicted in the Magistrate's Court in respect of a charge under section 193, Indian Penal Code, but was acquitted by the Sessions Judge on appeal. He is now the applicant in favour of whom the sanction in question before me has been granted. The statement in respect of which Ram Raja Dat has been orderded to be prosecuted is in the following words: "I did not pay any rent to *Musammat* Beni Bai. I was not her sub-tenant. The word 'sub-tenant' against my name in the coupon of the money order as to 1319 *Fasli* was written by *dhoka*." It may be explained at once that, for three consecutive years, rent due from *Musammat* Beni Bai on account of her holding or holdings was remitted by Ram Raja Dat direct to the *zamindar* by means of money orders. In filling up the prescribed form for one of these money orders, namely, that one by which rent for 1319 *Fasli* was remitted, Ram Raja Dat described the rent as due from *Musammat* Beni Bai, tenant, paid through Ram Raja Dat, sub-tenant. Apart from this document it would seem that the only evidence available to support the charge in respect of which the prosecution of Ram Raja Dat has been sanctioned is to be found in the oral evidence which may be expected to be given by Sheo Dayal *Patwari* and by the two witnesses who were produced by the said Sheo Dayal as his defence witnesses when he himself was on his trial: that is to say, the two witnesses in question were not heard of during the enquiry before the Assistant Collector and appeared in evidence for the first time in Sheo Dayal's defence, after Ram Raja Dat as well as other witnesses had been examined for the prosecution in the case in which Sheo Dayal was accused. From the records before me it appears that what Sheo Dayal and his two witnesses are prepared to assert is something as follows: that a certain sum of Rs. 23-4-5, which happened to be rent due from *Musammat* Beni Bai to her *zamindar*, was paid by Ram Raja Dat to that lady in the presence of the *patwari*, was entered by the latter in his papers as a payment from a sub-tenant to the tenant-in chief and that the thumb-impression of *Musammat* Beni Bai was thereupon taken on the *patwari's siyaha*, in order to attest this payment. The money itself, however, was there and then handed back by *Musammat* Beni Bai to Ram Raja Dat, with a request that he should forward it by money order to the *zamindar* in payment of the rent due to the latter from *Musammat* Beni Bai herself. So far as the papers before me show, no explanation

has yet been suggested as to why the payment Ram Raja Dat is supposed to have made as a sub-tenant should have amounted to precisely the rent due for the year from the tenant-in-chief to the *zamindar*. It is clear also that, once Sheo Dayal and his fellow-witnesses coming to Court with this story, they will be faced by the fact that the thumb-impression taken on the *patwari's siyaha* has already been judicially examined and found not to be what they said it was, namely, the impression of the left thumb of *Musammat* Beni Bai. This statement of the facts is sufficient to show that the evidence available on behalf of the prosecution as against Ram Raja Dat is not particularly strong or free from suspicion. It is necessary also to consider what are precisely the statements in respect of which it is desired to prosecute Ram Raja Dat. He said, first of all, "I did not pay any rent to Beni Bai" beyond the fact that he three times sent rent due from that lady to the *zemindar* direct to the latter, the only evidence forthcoming to show that this statement was false is that of the witnesses who deposed to the incident already described. Now Ram Raja Dat made this statement as a prosecution witness against Sheo Dayal. Assuming as it seems proper to assume, that the two witnesses subsequently produced in Sheo Dayal's defence were not invented after the charge had been framed, then the facts to which they were prepared to depose must have been known to Sheo Dayal and his legal adviser while Ram Raja Dat was in the witness-box and subject to cross-examination. From the point of view of the defence the statement, "I did not pay any rent to Beni Bai," was a quibble or evasion, intended to keep the actual facts as to payment of rent for 1319 *Fasli*, if possible, from the knowledge of the Court. If it was intended to make that statement hereafter the basis of a prosecutiou for perjury, it was highly incumbent on the defence to cross-examine the witness in such a manner as would close all avenues of escape behind him, if he was wilfully lying, or would bring the facts clearly to his recollection if he was speaking hastily and in forgetfulness of the precise facts. The importance of paving the way for a subsequent prosecution by a careful and intelligent use of the right of cross-examination seems to be very imperfectly understood in many Subordinate Courts in this country. Ram Raja Dat's *next* statement requiring to be considered is, "I was not her sub-tenant." This is not altogether a pure statement of fact. From one point of view it is a mixed proposition of fact and of law. One thing known for certain at the present stage of this litigation is that the only Court competent by law to pronounce on the correctness of this proposition, which has hitherto dealt with the matter, has given a decision in Ram Raja Dat's favour. The *third* statement to be considered is that on the money order coupon already referred to Ram Raja Dat wrote himself down as a sub-tenant "*dhoka se*," that is to say, by mistake, or through some misunderstanding. From any possible point of view this assertion seems to me to be not a false statement, but a plain truism. I do not think this is a suitable case for a prosecution and I revoke the order of sanction passed by the Court below.

Order revoked.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 168 OF 1915.
CASE REFERRED NO. 15 OF 1915.
April 9, 1915.

Present:—Mr. Justice Oldfield and Mr. Justice Napier.

C. KRISHNAMACHARI—ACCUSED

versus

MESSRS. SHAW WALLACE AND COMPANY—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 179, 181—Charge of criminal breach of trust—Jurisdiction—Special and general provisions—Interpretation.

According to the ordinary canons of construction, a special provision should ordinarily receive effect unqualified by the general. [p. 333, col. 1.]

Section 179 of the Criminal Procedure Code can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done. [p. 333, col. 2.]

It is the Court within whose jurisdiction the primary loss takes place that can take cognizance of the offence of criminal breach of trust. [p. 334, col. 1.]

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Where, therefore, the accused was appointed agent for the sale of the complainant's oil at Nandyal and used to send periodical reports to his principal at Madras showing the quantity of oil sold and the amount of money received, but after a certain time ailed to do so and left his place of business and made away with the money:

Held, that inasmuch as the misappropriation was only of the money received and the loss primarily ensued to the complainant as a consequence of the accused's conduct at Nandyal, the Court of the Presidency Magistrate at Madras had no jurisdiction to try the case. [p 334, col. 1.]

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the third Presidency Magistrate, George Town, in his letter R.O.C. No. 132 of 1915.

FACTS.—Messrs. Shaw, Wallace and Co., instituted a complaint before Mr. Narayana Menon, Presidency Magistrate, George Town, for criminal breach of trust against C. Krishnamachari, alleging that he had misappropriated a sum of Rs. 11,000 and odd as their sub-agent at Nandyal for the sale of Messrs. Best and Co.'s kerosene oil. It was found by the Court that the oil was entrusted to the accused at Nandyal, and not at Madras as alleged in the complaint. The Counsel for the accused then contended that the Courts in Madras had no jurisdiction to try the case.

The Presidency Magistrate, after hearing the arguments of the Hon'ble Mr. T. Richmond for the prosecution and Mr. R. N. Aiyangar, for the accused made a reference on the point to the High Court under section 432, Criminal Procedure Code, stating that he was inclined to agree with Mr. R. N. Aiyangar and felt considerable doubt as to whether section 181 (2) was intended to be subsidiary to section 179.

The Hon'ble Mr. *T. Richmond*, for the Complainant:—As the loss took place in Madras and the agent had to render account at Madras and remit money to Madras, the Presidency Magistrate's Court had jurisdiction to try the case. He referred also to section 179, Indian Penal Code, and to the cases in *Rajani Binod Chakravarti* v. *All India Banking Company* (1) and *Rambilas, In re* (2).

Mr. *R. N. Aingar*, for the Accused:—Section 181, sub-section 2, Criminal Procedure Code, was quite clear and section 179 should be subject to section 181 (2). The loss occurred at Nandyal and therefore, only the Court at Nandyal had jurisdiction over the offence.

The *Crown Prosecutor*, for the Government, supported Mr. *R. N. Aiyangar*.

JUDGMENT.

OLDFIELD, J.—The question on this reference is whether the third Presidency Magistrate has jurisdiction to try the accused for an offence punishable under section 406 or 409 of the Indian Penal Code, or whether he should return the complaint for presentation to a competent Court at Nandyal, Karnool District.

The circumstances are set out in the complaint only generally. But the material allegations appear, from the evidence already taken and the statements of complainant's Counsel, to be that the accused was appointed agent for the sale of complainant's oil at Nandyal, that his periodical reports showed a certain quantity of oil sold and a certain sum of money received and (after deduction of commission, etc.) to be accounted for and that, when called on to account, the accused failed to do so, leaving Nandyal after locking up his place of business and secreting his books, the inference being that he had made away with the funds in his charge. No suggestion is made that any oil entrusted to him has been converted to his use or dealt with otherwise than in accordance with complainant's instructions; that is, by sale to customers. The misappropriation relied on is accordingly not of the oil, but only of the money received for it; and we can, therefore, dismiss from consideration what seems to have been thought material before the Magistrate, the allegations as to the origin of the oil whether it came from Madras or Cocoanada. The fact that the accused was appointed agent by an order sent from Madras is also without significance in a criminal case. The only ground, which we have to consider as justifying the jurisdiction of the Madras Court, is that loss ensued there to the complaintant firm as a consequence of the accused's conduct at Nandyal and that the case is, therefore, covered by section 179, Criminal Procedure Code, not by section 181 only, in which offences

(1) 22 Ind. Cas. 192; 17 C. W. N. 1207; 15 Cr. L. J. 48.

(2) 26 Ind. Cas. 136; (1914) M. W. N. 894; 15 Cr. L. J. 688; 16 M. L. T. 505.

under sections 406 and 409 are specially dealt with. In accordance with the ordinary canons of construction the special provision should ordinarily receive effect unqualified by the general. Clear reason must, therefore, be shown in the wording of section 179 or otherwise before complainants' contention can be accepted.

That contention has been endorsed and negatived in different decisions ; but, though in some of them attempts have been made to state the principle applicable in more or less general terms, the weight of such statements is impaired by the fact that either the allegations before the Court and the exact relations between the parties are not stated fully in the reports or the conclusion may have been influenced by uncertainty regarding the place in which the money or property concerned was received or converted by the accused. *Rajani Binod* v. *All India Banking Company* (1) is an instance of the former class of cases, and *George Langridge* v. *Grace Atkins* (3) of the latter.

In this Presidency *Assistant Sessions Judge of North Arcot* v. *Ramaswami Asari* (4), no doubt, supports both the propositions which the prosecution has to establish, that (1) the offence is constituted by the accused's dishonest conversion and the loss which ensued as its consequence, and (2) such loss ensues not only where and when the conversion takes place, but also where the complainant ordinarily receives the accused's accounts and remittances. In the case of *Rambilas, In re* (2), however, two other learned Judges did not feel compelled to treat this as a considered ruling on the point ; and with all due deference we follow them so far. Their decision, however, negatived the first of the propositions above stated, on the ground that the existence of dishonest intention, not the ensuing of loss, was the essential element in the offence of criminal breach of trust and that there was, therefore, no question of any consequence or of the application of section 179 ; and we respectfully dissent from this view. For, we are unable to conceive, and the learned Counsel has been unable to suggest, any case in which more than mere preparation or attempt could be held established but no loss whatever, it may be only a temporary or highly insignificant one, could be found to have been caused. Our conclusion is in fact that the loss ensues immediately on the conversion, because by it the property of the principal, entrusted to the agent, is diminished in the latter's hands. It is the complainant firm's case that accused's collections (less commission) belonged to it from the date of receipt, and it is not alleged that any appropriation was necessary to change their ownership. The date of conversion may be uncertain and susceptible of no more definite statement than as prior to the proper date for remittance. That, however, cannot alter the fact that the firm's funds in Nandyal were diminished. It follows that primarily at least it suffered wrongful loss there.

Complainant's *second* proposition stated above is clearly essential to his contention. For section 179 can be applied only to cases in which the consequence necessary to constitute the offence ensues in some place other than that in which the accused's act is done. It has been supported with reference to the present case on the ground that, although the firm's loss at Nandyal may have been a primary consequence, the loss at Madras the firm's head-quarters where its funds are kept, was a secondary one and was sufficient to attract the operation of the section. This distinction is not recognised explicitly in the majority of the cases relied on before us, perhaps because, as already observed, the place where loss was primarily sustained was uncertain. But it is referred to in *George Langridge* v. *Grace Atkins* (3) as the foundation of the decision in *Ganeshi Lal* v. *Nand Kishore* (5) on which the accused relies; and it was not drawn in the former case, because the assessments in the complaint did not support it. Its validity was moreover endorsed directly in *Sirdar Miru* v. *Jethabhai Amirbhai*(6), where the act in question was a complete causing of

(3) 17 Ind. Cas. 792; 35 A. 29; 10 A. L. J. 431; 13 Cr. L. J. 856.

(4) 22 Ind. Cas. 991; (1914) M. W. N. 324; 26 M. L. J. 235; 1 L. W. 302; 15 Cr. L. J. 207.

(5) 15 Ind. Cas. 319; 10 A. L. J. 45; 13 Cr. L. J. 479; 34 A. 487.

(6) 8 Bom. L. R. 513; 4 Cr. L. J. 54.

grievous hurt and it was held that complainant's consequent incapacity for the statutory period in another jurisdiction would not affect the venue. We follow these authorities and hold that the complainant firm's secondary loss at Madras will not give the third Presidency Magistrate jurisdiction. He must return the complaint for presentation to a competent Magistrate having jurisdiction over Nandyal.

NAPIER, J.—I concur.

Petition allowed.

PRIVY COUNCIL.

APPEAL FROM THE PUNJAB CHIEF COURT.

March 3, 1915.

Present:—Viscount Haldane, Lord Dunedin, Lord Atkinson, Sir George Farwell and Mr. Ameer Ali.

BALMOKUND AND OTHERS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Practice—Criminal proceedings—Application for special leave to appeal—Staying execution of sentence of death—Jurisdiction.

As the Judicial Committee of the Privy Council is not a Court of Criminal Appeal, the tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government and is outside the province of the Judicial Committee. [p. 335, cols. 1 & 2.]

Their Lordships were, therefore, unable to make any order on an application to stay execution of a sentence of death while an appeal to the Board was pending. The Executive Government, if notified, would, said their Lordships, no doubt, give due weight to the fact that such an appeal was pending, and consider the circumstances, but the Board would express no opinion as to whether the sentence ought to be suspended. [p. 335, col. 2.]

Application to postpone sentences of death passed upon the petitioners pending the the hearing of their petition for special leave to appeal and their appeal to His Majesty in Council.

FACTS.—The facts as appearing from the petition were as follows:—

The four petitioners, Balmokund, Basant Kumar, Amir Chand and Avad Bihari, and others were arrested in connection with the death, on the 17th May 1913, of one Rampadarath, as the result of an explosion of a bomb with which he came in contact in the Lawrence Gardens in Lahore. All the accused persons were charged with a number of offences, and an inquiry into the charges was held by Mr. Connolly, Magistrate of the first Class of Delhi, who tendered a pardon to two of the accused, Dina Nath and Sultan Chand. Both approvers thereupon gave evidence. The petitioners together with certain other accused were charged with conspiring to murder under section 302, read with section 120B of the Indian Penal Code. Two of the petitioners, Amir Chand and Avad Bihari, were also charged with offences under sections 4, 5, and 6 of the Explosives Act, 1908, and three of the petitioners, Avad Bihari, Amir Chand and Balmokund, and another accused were further charged under section 124 A of the Indian Penal Code. There were in all eleven separate charges against the accused persons. By an order, dated the 12th May 1914, the Magistrate committed the petitioners, together with seven others, to the Court of the Sessions Judge, Delhi, for trial.

At the trial, which took place before Mr. H. H. Harrison, Special Sessions Judge, Delhi, with the aid of three Assessors, the main charge against the accused was under sections 120B and 302 of the Indian Penal Code. But the petitioners objected at the trial that the charge was bad in law, inasmuch as they could not be charged with an offence under section 120B of the Indian Penal Code, which came in force on the 27th March 1913 under the provisions of Act VIII of 1912. The petitioners and other accused also objected that the Trial Judge had no jurisdiction to try some of them, and that the trial was bad for misjoinder of charges. On the 6th October 1914 the Special Sessions Judge convicted the petitioners and two of the other accused persons, and sentenced the petitioner Basant Kumar to transportation for life under section 302 read with section 120B of the Indian Penal Code and the other three petitioners to death.

The petitioners appealed to the Chief Court of the Punjab against the said conviction and sentences, and the Crown applied to that Court in revision for enhancement of the sentence passed on the petitioner Basant Kumar. The Chief Court delivered

judgment about the 2nd week of February 1915,* dismissing the petitioners' appeal and confirming the sentences of death passed on three of the petitioners, and enhancing the sentence inflicted upon the petitioner Basant Kumar from transportation for life to sentence of death.

The petitioners submitted that the only evidence on which they had been convicted was that of the approver Dina Nath, who made several statements about the case, that his evidence was not corroborated in material particulars by any independent evidence, and that his statements were inconsistent and untrue and absolutely unworthy of credit. The petitioners Amir Chand and Balmokund also submitted that there was no evidence upon the record to justify their conviction for murder. The petitioners further submitted that the Trial Judge admitted in evidence a large mass of irrelevant evidence which prejudiced their trial, and caused a gross miscarriage of justice. They, therefore, submitted that their conviction had been contrary to the principles of natural justice.

The petition also stated that the petitioners' legal advisers were instructed by cable and had not then received a transcript of the evidence and the proceedings but were compelled to draw up the petition on such material as were available to them, and that they were not in a position to deal fully with the case at that stage.

Sir *Robert Finlay*, *K. C.* (with him Mr. *Dube*), for the Petitioners, applied under the circumstances of the case for the hearing of the petition to be adjourned for at least a month after the arrival of the necessary documents, and for stay of execution of the sentence of death while the hearing of the petition was pending.

Mr. *Dunne*, for the Respondent, was not heard.

JUDGMENT.

VISCOUNT HALDANE, L. C.—Their Lordships are unable to advise His Majesty to make any order on the petition for special leave to appeal at this stage.

With regard to staying execution of the sentence of death, their Lordships are unable to interfere. As they have often said, this Board is not a Court of Criminal Appeal. The tendering of advice to His Majesty as to the exercise of his prerogative of pardon is a matter for the Executive Government, and is outside their Lordships' province. It is, of course, open to the petitioners' advisers to notify the Government of India that an appeal to this Board is pending. The Government of India will, no doubt, give due weight to the fact, and consider the circumstances. But their Lordships do not think it right to express any opinion as to whether the sentence ought to be suspended. No order made.

Solicitors for the Petitioners: *Messrs. Barrow, Rogers* and *Nevill.*

Solicitors for the Respondent: *The Solicitor, India Office.*

*See 28 Ind. Cas. 738—*Ed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION PETITION NO. 144 OF 1915.

March 24, 1915.

Present:—Mr. Justice Piggott.

MUKHTAR AHMAD AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 323, 332—Excise Inspector searching house—Irregularities—Public servant—Discharge of duty—Hurt caused to Inspector—Offence.

An Excise Inspector in searching the house of the applicant on the suspicion that he might find there cocaine committed a number of irregularities in conducting this search. He had no warrant authorizing him to make the search. He brought with him only one search witness and directed a constable to scale the outer wall of the house. The accused caused hurt to the Inspector and the constables:

Held, that the Inspector and the constables were not acting in the discharge of their duties as public servants and that, therefore, the accused were not guilty under section 332 but only under section 323 of the Penal Code. [p. 336, col. 1.]

Criminal revision against an order of the Sessions Judge of Saharanpur.

Mr. *G. P. Boys*, for the Petitioners.

Mr. *R. Malcomson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—Mukhtar Ahmad and Amir Ahmad have been convicted by a Magistrate on the charge of having caused hurt to an Excise Inspector, one Mr. D. D. C. Das, and certain constables in the discharge of their

In re CHERUKATH MAMMAD.

duties as public servants, and have been sentenced to imprisonment and fine. The conviction and the sentences have been affirmed by the Sessions Judge on appeal. It seems to me that the Courts below have assumed, but cannot be said to have judicially determined, that the persons who were hurt were acting at the time in the discharge of their duties as public servants. They have dealt with the plea of private defence set up on behalf of the accused persons, and have excluded that plea by reason of the provisions of section 99 of the Indian Penal Code. This finding implies that the Excise Inspector and the constables were resisted at a time when they, being public servants, were acting in good faith under colour of their office. That is not the same thing as a finding that they were acting in the discharge of their duties as public servants. The distinction was pointed out by a Bench of this Court in *Queen-Empress* v. *Dalip* (1). So far as my examination of the record goes, I do not find myself able to arrive at the conclusion that the Excise Inspector and the constables were acting in the discharge of their duties as public servants. Mr. Das, who was engaged in searching the house of Mukhtar Ahmad, accused, on suspicion that he might find there cocaine, committed a number of irregularities in conducting this search. He had no warrant authorising him to make this search; he brought with him only one search witness (section 103 of the Code of Criminal Procedure), and nothing in sections 102/48 of the same Code justified him in directing a constable to scale the outer wall and effect a burglarious entry into the house. Following the precedent set by the reported decision of this Court, which I have already quoted, I set aside the conviction of Mukhtar Ahmad and Amir Ahmad under section 332 of the Indian Penal Code and in lieu thereof convict them of the offence of causing hurt under section 323 of the same Code. I reduce the sentence to one of imprisonment for such period as they may have already undergone, together with a fine of Rs. 15 each. Any fine in excess of this amount which has been paid by the applicants will be refunded. The accused need not surrender and their bail-bonds are discharged.

Order modified.

(1) 18 A. 246; A. W. N (1896) 48.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 790 OF 1914.
CRIMINAL REVISION PETITION No. 655 OF 1914.
April 15, 1915.

Present:—Mr. Justice Kumaraswami Sastri.

In re CHERUKATH MAMMAD AND OTHERS ACCUSED—PETITIONERS.

Criminal Procedure (Act V of 1898), ss. 367, 424—Judgment—Several accused—Appellate Court, duty of.

Where there are several accused who have appealed, it must appear from the face of the judgment that the case against each of the accused has been taken into consideration and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each of the accused.

Jamait Mullick v. *Emperor*, 35 C. 138; 12 C. W. N. 134; 6 Cr. L. J. 427; *Farkan* v. *Somsher Mahomed*, 22 C. 241, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tellicherry Division, in Criminal Appeal No. 77 of 1914, preferred against that of the second Class Magistrate of Karmharanand Taluq, in Calendar Case No. 151 of 1914.

The Hon'ble Mr. *T. Richmond*, for the Petitioners.

Mr. *P. R. Grant*, for the Government.

ORDER.—The Joint Magistrate has not considered the question of possession, or found that the accused had any common object. There were 20 accused; but the Joint Magistrate has not considered the case of each accused or evidence. The whole case is disposed of in two short paragraphs. In *Jamait Mullick* v. *Emperor* (1) it was held that when there are several accused, "it must appear on the face of the judgment that the case against each of the accused has been taken into consideration and reasons should be given, as far as may be necessary, to show that the Appellate Court has devoted judicial attention to the case of each of the accused". *Farkan* v. *Somsher Mahomed* (2) is also in point.

I set aside the judgment of the Appellate Court and direct that the appeal be re-tried and judgment written according to law.

Conviction set aside; Case remanded.

(1) 35 C. 138; 12 C. W. N. 134; 6 Cr. L. J. 427.
(2) 22 C. 241.

RAMESHWAR MALIA *v.* JIU THAKUR.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 7 OF 1912.

March 18, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

Kumar RAMESHWAR MALIA AND OTHERS —DEFENDANTS Nos. 9, 13, 14, 15 —APPELLANTS

versus

Sri Sri JIU THAKUR, BY HIS *Shebait*, *Mahant Sri Sri* RAM CHANDRA ACHARJYA GOSWAMI AND OTHERS— PLAINTIFFS—RESPONDENTS.

Permanent lease, grant of, by shebait—*Legal necessity* —*Limitation Act* (*XV of* 1877), *Sch. II, Art.* 134, *scope of*—*Limitation Act (IX of* 1908), *s.* 30, *applicability of* —*Usufructuary mortgage by* shebait, *effect of.*

The grant of a permanent lease without legal necessity is in excess of the powers of the *shebait* who grants the lease. [p. 337, col. 2.]

Article 134 of the second Schedule to the Limitation Act of 1877 only applies to the purchase of an absolute interest and not to the grant of a permanent lease. [p. 338, col. 1.]

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284 (P. C.); 6 A. L. J. 857, 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148 and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose*, 10 Ind. Cas. 683; 38 C. 526; 9 M. L. T. 448 (P.C.); 15 C. W. N. 417; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; (1911) 2 M. W. N. 81; 21 M. L. J. 1145, followed.

Damodar Das v. *Lakhan Das*, 7 Ind. Cas. 240; 14 C. W. N. 889; 7 A. L. J. 791; 12 Bom. L. R. 632; 12 C. L. J. 110; 8 M. L. T. 145: 20 M. L. J. 624; 37 C. 885 (P. C.); (1910) M. W. N. 303; 37 I. A. 147, re-to.

In the Limitation Act IX of 1908 the word "transferred" was deliberately inserted in place of the word "purchased", in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II, of the Limitation Act of 1877. [p. 338; col. 2.]

The grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. [p. 338, col. 2.]

Currie v. *Misa*, (1875) 10 Ex. Cases 153; 1 App. Cas. 554, referred to.

Section 30 of the Limitation Act, 1908, only applies where there is a period of limitation "prescribed," both by the Act of 1877 and the Act of 1908. Where the plaintiff cannot bring his case under section 30 the suit is barred by limitation under Article 134 of the first Schedule to the Limitation Act of 1908. [p. 339, col. 1.]

In a usufructuary mortgage of a *debuttar* property in favour of the Raja of Pachete the validity of the mortgage was not questioned:

Held, that it was not open to the *shebait* to determine, without the Raja's consent, the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him, and the receipt of rent by the Raja after the institution of the suit proved the existence of the lease at least in the mind of the Raja. [p. 339, cols. 1 & 2.]

Appeal against the decree of the Subordinate Judge, Bankura, dated the 21st of September 1911.

Babus *Dwarka Nath Chakravarti* and *Bankim Chandra Mukherjee*, for the Appellants.

Dr. *Rash Behary Ghose*, Dr. *Dwarka Nath Mitter*, Babus *Bijoy Kumar Bhattacharyya* and *Hem Chandra Mukherjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants Nos. 9 and 13 against the judgment of the learned Subordinate Judge of Bankura dated the 21st September 1911.

The suit was brought by the plaintiff, an idol, through his *shebait* to recover possession of the properties mentioned in the plaint, on the ground that they formed part of the *debuttar* estate of the idol and that a *putni* settlement, dated the 29th of *Baisakh* 1261, granted by a former *shebait* in favour of the predecessors of the defendants Nos. 1 to 13 was invalid.

On the present appeal it was not argued by the appellants that the idol had no interest in the properties in suit. Having regard to the evidence which has been considered at great length by the learned Subordinate Judge, it is clear that the endowment is an ancient one. It was, however, argued before us, though somewhat faintly, that the properties were the private property of the *shebait*, subject nevertheless to a charge for the maintenance of the worship of the idol. On the evidence before us I think we can come to only one conclusion, namely, that there was an absolute dedication of the properties in favour of the idol.

The next question is, whether the present suit is barred by limitation.

The grant of a permanent lease without legal necessity was in excess of the powers of the *shebait* who granted the lease. The *shebait* who granted the lease died in the year 1859. Next came an infant who held the office until the year 1863. His adoptive mother then held the office for a few months and was succeeded by the father of the present *shebait*. The present *shebait's* father died on the 28th of July 1893 and since

that date the present *shebait* has held the office. The rent has been duly paid.

Now the question as to whether a suit of the present nature is barred after 12 years from the date of the permanent lease under Article 134 of Schedule II of the Limitation Act (XV of 1877), has been considered in two judgments of the Privy Council in the cases of *Abhiram Goswami* v. *Shyama Charan Nandi* (1) and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2). The facts in those two cases cannot be distinguished from the facts in the present case. The view that the Privy Council took with regard to Article 134 of the Schedule II to the Act of 1877 was that the Article only applied to the purchase of an absolute interest and not to the grant of a permanent lease. This view of the law was expressed in the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (1). It is, however, to be noticed that the judgment in the case of *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (2) was delivered by their Lordships after an application for a review of judgment [See *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (3)]. And in delivering their judgment their Lordships made the following remarks:—"The only question remaining depends on the law of limitation. On this point attention has been called to the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (1) decided by this Board in July 1909. It is impossible to distinguish that case from the present. Whatever might have been the inclination of their opinion if the matter had been *res integra* it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Board delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami* v. *Shyama Charan Nandi* (1). They do so with the less hesitation because the language of the Article under discussion in that case and in this has been altered by subsequent legislation."

Another authority was also relied upon in the course of the argument. That authority was the decision by the Privy Council in the case of *Damodar Das* v. *Lakhan Das* (4). That decision did not, however, turn on Article 134 of the Schedule to the Act of 1877. There was nothing in that case to show that the property was vested in the *chela* as trustee for the idol. Their Lordships found agreeing with this Court that the property belonged to the idol and that the possession of the junior *chela* had become adverse to the idol.

So far as the evidence goes in this case, it appears that the property was vested in the *shebait* in trust for the idol. The original grant is not forthcoming but subsequent documents appear to have recognised it. The question of limitation must, therefore, be considered with reference to Article 134 of Schedule I of the Limitation Act (IX of 1908). The wording of that Article is as follows:—"To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration." It will be noticed that the Article in the present Act has been substantially altered from the Article as it appeared in the Act of 1877. Presumably the word "transferred" was deliberately inserted in place of the word "purchased," in view of the decisions on the meaning of the word "purchased" in Article 134, Schedule II, of the Act of 1877.

The learned Subordinate Judge has found that the grant of a permanent lease was a "transfer". In that view I agree. He has, however, come to the conclusion that it was not a transfer for valuable consideration. In the opinion of the learned Judge a transfer for valuable consideration in a case such as the present could only take place when a fine or premium was paid for the grant of lease. The learned Judge, also found that there was no proof that the premium was paid for the grant of the *putni* in the present case. It may, however, be doubted whether evidence of the actual payment of the premium could, at this time, be produced. But whether that be so or not, I think that a grant of a permanent lease at a considerable annual rent is a transfer for valuable consideration. As was

(1) 4 Ind. Cas. 449; 36 C. 1003; 10 C. L. J. 284 (P. C.); 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1; 36 I. A. 148.

(2) 10 Ind. Cas. 683; 38 C. 526; 9 M. L. T. 448 (P. C.); 15 C. W. N. 417; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; (1911) 2 M. W. N. 28; 21 M. L. J. 1145.

(3) 14 C. W. N. ccxliv.

(4) 7 Ind. Cas. 240; 37 C. 885; 14 C. W. N. 889 (P. C.); 7 A. L. J. 791; 12 Bom. L. R. 632; 12 C. L. J. 110; 8 M. L. T. 145; 20 M. L. J. 624; (1910) M. W. N. 303; 37 I. A. 147.

remarked by the Exchequer Chamber in the case of *Currie* v. *Misa* (5), "a valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

In my opinion the grant of the permanent lease in the present case was a transfer for valuable consideration and the present suit is barred under Article 134 of the Schedule I to the Act of 1908, unless the plaintiff can bring his case under section 30 of the Act.

The learned Vakil for the respondent in the present appeal, however, based his main argument on this branch of the case not on the ground stated in the judgment of the learned Subordinate Judge, but on section 30 of the Limitation Act, 1908. But that section does not, in my opinion, apply. Section 30 only applies when there is a period of limitation "prescribed" both by the Act of 1877 and the Act of 1908. The decisions of the Privy Council show that no period of limitation was "prescribed" for a suit of the present nature under the Act of 1877.

The present suit is, I think, barred by limitation.

Another point that raises a difficulty in the way of the respondent is the usufructuary mortgage in favour of the Raja of Pachete. The respondent on the 8th of August 1909 granted to the Raja a usufructuary mortgage of (amongst other properties) the property in suit for a term that had not expired at the institution of the present suit. Whether that mortgage was binding on the idol we do not know, the Raja not being a party to this suit. The mortgage is, however, expressed to be made for legal necessity and is treated by the learned Judge in his judgment as being a valid transaction. On the 9th of September 1909 notice to quit was served on the defendants. But on the 15th of November 1910, that is after the institution of the present suit, the Raja received and granted a receipt for rent part of which accrued due after the institution of the suit. In the absence of the Raja we cannot determine whether the mortgage to the Raja was a valid transaction, but assuming, as the learned Judge did, that the mortgage was valid, then it was not open to the *shebait* to determine without the Raja's consent the lease to the defendants, the benefit of which had been expressly assigned by the *shebait* to the Raja in the usufructuary mortgage to him. Moreover, the receipt of rent by the Raja, after the institution of the suit, would seem to show that at the date of the receipt the Raja considered the lease as in existence. Further, under the terms of the decree the defendants are liable to pay mesne profits as from the date of the expiry of the notice to quit, although they have paid rent to the Raja to a date subsequent to the institution of the present suit under an assignment of the rents to the Raja under the terms of a document executed by the *shebait*, which the learned Judge treats as a valid transaction in his judgment. Clearly the Raja ought to have been a party to the present suit and if his usufructuary mortgage is a valid one, then the defendants have paid rent to him to a date subsequent to the suit and are not liable to ejectment.

I think we ought to reverse the decision of the learned Judge in the Court below and allow the present appeal. The plaintiff-respondent must pay to the appellants their costs both in this Court and the Court below.

The defendants Nos. 14 and 15, who are co-appellants with the defendants Nos. 9 and 13 in this appeal, have, it is represented, settled their disputes with the plaintiff. Their appeal is, therefore, allowed to be withdrawn.

TEUNON, J.—I agree.

Appeal allowed.

(5) (1875) 10 Ex. Cas. 153; 1 App. Cas. 554.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION PETITION No. 348 OF 1914.

February 11, 1915.

Present:—Mr. Batten, A. J. C., and Mr. Stanyon, A. J. C.

BHARGAVA COMMERCIAL BANK, LTD., AT JUBBULPORE—DECREE-HOLDER—PLAINTIFF

versus

MESSRS. MACKINNON AND COMPANY, OLD BREWERY—JUDGMENT-DEBTOR—DEFENDANT.

Execution Attachment—Custodia legis—*Property*

not liable to be legally possessed by private persons, attachment of—Court, duty of - Beer, whether attachable and saleable—Excise Act (XII of 1896), s. 45.

A *custodia legis*, such as the possession of attached property by a Civil Court executing a decree, requires no departmental sanction or license even, where the property is of a kind which cannot legally be possessed by a private person without such permission. [p. 342, col. 2.]

Therefore, the possession of attached property by a Court is no violation of the special law governing the possession of such property by private persons. [p. 343, col. 1.]

Where a District Judge passed an order attaching beer, an excisable property:

Held, that section 45 of the Excise Act had no application whatsoever to the acts of the District Court or any of its officials or agents acting under its orders. [p. 343, col. 1.]

It is the duty of every Judge to exercise the powers vested in him in such a way as to give effect to all provisions of the law. [p. 343, col. 2.]

Beer brewed within the local limits to which the Excise Act, 1896, applies is not exempt from attachment and sale in execution of a Civil Court decree. [p. 343, col. 2.]

Where a Civil Court attaches property of a nature governed by any Special law, such Court is bound to proceed with great circumspection so as not to defeat any of the purposes for which such Special law was enacted. [p. 343, col. 2.]

Civil revision against the order of the District Judge, Jubbulpore, dated the 8th October 1914.

Mr. *J. Mitta*, for the Decree-holder.

The Hon'ble Mr. *M. R. Dixit*, for the Judgment-debtor.

JUDGMENT.—It is necessary to state the circumstances which have led up to this revision. The plaintiff is the Bhargava Commercial Bank, Limited, and the defendant is the firm of Mackinnon and Company, Brewers. Both corporations carry on business, respectively, as bankers and brewers, among other places, at Jubbulpore. The plaintiff, having obtained a decree for Rs. 14,896-6 against the defendant, applied, on the 6th October 1914, to the District Court at Jubbulpore, for execution of the same in respect of the above sum, *plus* Rs. 190 costs of execution, or Rs. 15,086-6-0 in all. The assistance of the Court was claimed by attachment and sale of the defendant's brewery at Jubbulpore, comprising a building and the plant, furniture and stock contained therein. On the 8th October 1914 the District Judge (Lala Sheo Narayan) ordered the issue of warrants for the attachment of this property, and two warrants were accordingly sent out on the 22nd October 1914. One of these was in the form of a prohibitory order under Order XXI, rule 54, and Order XXXVIII, rule 7, of the Code of Civil Procedure, 1908. It had reference to the brewery building and was executed by the fixation of copies to the building and to the Court-house. The other was a warrant for the attachment of moveable property under Order XXI, rule 30, of the said enactment. Under this warrant the following articles situated in and about the brewery building were attached:—

			Rs.
5	tables	...	25
1	iron safe	...	50
2	racks	...	2
1	carpet	...	5
6	chairs	...	6
1	telescope	...	10
3	clocks	...	15
1	almirah	...	2
1	almirah	...	1
1	ice machine	...	2,500
1	sawing machine	...	500
17	fermenting vats	...	1,000
1	cooler	...	400
6	vats and loggers	...	300
326	empty casks	...	1,000
177	casks of beer	...	4,500

Both warrants were executed on the 28th October 1914, and custody of the above articles was made over to the decree-holder as a Receiver on behalf of the Court. Nothing was removed from its place. The premises were locked up and the keys taken away by the agent of the Receiver.

On the 31st October 1914 the decree-holder filed an application before the District Judge stating

(1) that the above property was attached on the 28th October 1914;

(2) that the attached property had been given into his custody as a Receiver because no one else would accept it, and that he had closed the brewery as he could not work it;

(3) that he had been informed by the Pleader of the judgment-debtor that the beer would be spoiled in six days and threatened with liability for the damage to stock alleged to be worth Rs. 12,000.

He, therefore, made an urgent appeal to the Court to make over the brewery

to the judgment-debtor after taking security for the due performance of the decree in any of several ways suggested.

The District Judge took no notice whatever of this application. On the 11th November 1914, the Commissioner of Excise made an inspection of the brewery, and in paragraph 3 of his note made the following remarks:—

"The brewery has been attached on the 28th ultimo by the District Judge on account of a decree passed against the brewers. I invite the attention of the Deputy Commissioner to section 45 of the Excise Act. If the Civil Court has taken possession of the brewery, the officers concerned seem to me to be liable to punishment under that section.

* * * * * * * * *

If, as I understand, this interference by the Civil Court with the working of the brewery licensed by Government under section 5 of the Excise Act was effected without any reference to the Deputy Commissioner, the act seems to me to have been not merely discourteous but also illegal."

On the same day—the 11th November 1914—the Deputy Commissioner wrote demi-officially to the District Judge (now Shams-ul-ulama Muhammad Amin, *vice* Lala Sheo Narayan, retired) in the most courteous terms, mentioning the view taken by the Excise Commissioner as to the legality of the attachment, drawing attention to the inconvenience and probable loss resulting therefrom, and suggesting that the brewery might be made over to Messrs. Mackinnon and Company, subject to the attachment. This was stated to be in anticipation of formal proceedings. The new Judge only took over charge of his office on the day on which this letter was sent, and on the following morning made an order releasing from attachment the 177 casks of beer. He maintained the attachment on the rest of the property, but ordered that the judgment-debtor should be allowed to carry on the brewery business and render accounts to the Court and deposit proceeds therein. The Judge fixed the 24th November 1914 for the hearing.

On the 14th November 1914 the decree-holder made another application to the Court, asserting that the local manager of the judgment-debtor, one Mahomed Rahim, was evading taking over management of the brewery and was apparently building up a foundation for a claim for damages. The applicant, therefore, handed over the keys to the Court, and asked the Judge to have the brewery made over to the defendant by the bailiff. This was done the same day and the judgment-debtor became the Receiver of the Court. He gave a receipt for the beer released from attachment, and a Receiver's acknowledgment for the attached property made over to his custody.

On the 5th December 1914 the Deputy Commissioner wrote officially to the District Judge in formal confirmation of his above-mentioned demi-official communication. After drawing attention to section 45 of the Excise Act he went on thus:—

"I need scarcely enlarge on the administrative inconvenience which would arise, not to speak of inconvenience to the public, if breweries and distilleries were liable to attachment. Serious loss would occur to Government in respect of reduced receipts from royalty if such places were liable to be closed without notice to the executive officer concerned; and the public on being suddenly deprived of their supply of liquor would be aroused to a state of general indignation. I do not know whether the point as to whether a brewery is liable to attachment has ever formed the subject of an authoritative ruling; but it appears to me desirous that no Civil Court should ever willingly upset the excise arrangements of the Local Government, and for this reason a notice of an intended attachment could reasonably be expected; while the fact that no one can possess a brewery without a license would tend to show that such properties were not liable to attachment.

"If you agree in this view I would request that the attachment be withdrawn; because so long as the instruments and apparatus for brewing are under attachment it is impossible for the Government licensee to brew any beer, and this is causing serious loss to Government."

The District Judge replied officially to this letter on the 7th December 1914, pointing out what he had done, and affirming his opinion that all but the beer was liable to attachment. He expressed his regret for attachment of the beer having been made inadvertently by his predecessor and stated that in future, notice of attach-

ment in such cases would be given to the Deputy Commissioner. He concluded his reply with these words,

"I need hardly assure you that all Civil Courts would most willingly help the executive authorities in their excise and any other administration as far as lies in their power."

We approve of these words as correct and proper, and we expect the same attitude from the other departments of the Government towards the Civil Courts.

On the 24th November 1914 the judgment-debtor made his first application to the Court in this execution case, when he tried to figure as a mere representative of the Bank of Upper India, Limited, which was said to hold a possessory mortgage over the Jubbulpore brewery for six *lakhs* of rupees. On that ground the judgment-debtor sought to have the attachment raised, or to be made subject to the prior incumbrance of the mortgagee Bank. The learned District Judge rightly refused to allow the judgment-debtor to plead the claim of his mortgagee, and ordered the sale of the attached property to take place on the 5th January 1915. The further hearing of the execution case was fixed for the 7th January 1915.

In the meantime, by an official letter, dated the 11th December 1914, the Commissioner of Excise invited the attention of the Judicial Commissioner to the matter, reiterating his opinion that the attachment was illegal and discourteous to the executive authorities, and constituted an offence punishable under section 45 of the Excise Act on the part of the Civil Court officials who had taken possession of the brewery. The learned Judicial Commissioner having directed that the case should be dealt with judicially by a Bench, it has been registered as a case under section 115 of the Civil Procedure Code, 1908, and notices were issued to all concerned. The Commissioner of Excise had no appearance entered before us on his behalf, and in response to the notice sent to him he has written officially to the Registrar stating that he does not wish to make any further representation in the matter. The decree-holder and judgment-debtor appeared by Counsel who were heard, but nothing was said in support of the view of the Commissioner of Excise that the attachment of the property amounted to an offence.

The points which seem to call for decision are:

(1) whether the attachment of the brewery or the beer in this case amounted to an offence under section 45 of the Excise Act?

(2) whether such attachment was illegal?

(3) whether there was any irregularity in the procedure of the Court?

(4) whether the intervention of the excise authorities was regular in form?

The *first* of these questions is easily answered in the negative, but we consider it expedient to deal with it somewhat fully so as, if possible, by a clear statement of what seems to be the law, to prevent any further misapprehension on the subject. When so responsible an officer of Government as the head of a department represents the procedure of a Judge to constitute an offence, the result may be to deter the Judge, especially if he is a junior member of the judiciary, from doing his duty. In the present case it has had the effect of misleading the District Judge into a hasty raising of a perfectly legal attachment of property said to be worth Rs. 4,500 and of alarming a decree-holder in the lawful pursuance of his claim againt the judgment-debtor.

For the purpose of deciding the first point we will assume that the Civil Court had no *jurisdiction* to attach the brewery and the beer. Nevertheless, no offence was committed, either by the Judge who ordered the attachment, or by the officials who carried out that order. The Commissioner of Excise appears to have wholly overlooked sections 77 and 78 of the Indian Penal Code. By applying section 40 of that Code it will be seen that the above sections apply to an offence under section 45 of the Excise Act. Then there is the further reason that section 45 has reference to section 5 of the same enactment, and a District Court is not a "person" within the meaning of that term in the latter. The Civil Court is a branch of the same Government which, in another branch of its administration, is represented by the Excise Department. A *custodia legis*, such as the possession of attached property by a Civil Court executing a decree, requires no departmental sanction, or license even where the property is of a kind which cannot legally be possessed by a private person without such permission.

It follows that the possession of attached property by the Court is no violation of the special law governing the possession of such property by persons. We, therefore, hold that section 45 of the Excise Act had no application whatsoever to the acts of the District Court or any of its officials or agents acting under its orders in the present case.

Then as to the legality of the attachment. That depends upon whether or not the property attached is within the category given in section 60 of the Code of Civil Procedure, 1908. The Civil Court derives its authority to make attachments in execution under that Code, and this authority is paramount to the authority of any executive officer such as the Commissioner of Excise or the Collector. We have set out above the property attached, and it is manifest that every part of it constitutes the saleable property of the judgment-debtor, which is, therefore, available for attachment and sale to satisfy his creditors. We have it on the admission of the judgment-debtor himself that the property is mortgaged to one of his creditors. The law may and does impose special restrictions upon the sale of some kinds of property. Some instances are to be found in the Civil Procedure Code itself: some in other enactments of a general or special kind. But the existence of such restrictions does not take the property out of the category of saleable property either in law or common sense. In *Purshottam Narayan* v. *Balvant Babaji* (1), it was held that country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court, even though under section 16 of the Bombay Abkari Act (Bombay Act V of 1878) the Collector's permission was held to be necessary for the execution sale. The Bombay Court further considered that sale without the Collector's permission would apparently subject the seller to prosecution under the above enactment. The learned Judges did not, however, specify whom they regarded as "the seller," whether the judgment-debtor whose property is sold without his act or consent, or the decree-holder who causes it to be sold for his benefit, or the Court which actually makes the sale. Probably the term was applied to the judgment-debtor as a vendor by compulsion, and the learned Judges declined to express any opinion on the question whether, if prosecuted, he would be able to make a good defence.

We concur with the above ruling only so far as it decides that country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court. The provisions of the Bombay Abkari Act place restrictions upon the manufacture, possession, removal, and sale of fermented liquor, *inter alia*, similar to those imposed on that product by the Excise Act, 1896; and we hold that beer brewed within the local limits to which the latter enactment applies is not exempt from attachment and sale in execution of a Civil Court decree. Whether section 8 regarding the removal, and section 21 regarding the sale, of fermented liquor apply to removal and sale under the orders of a Court executing a decree, is a point on which we express no opinion because it does not arise in the present case. We find that the attachment was wholly legal, and that the learned District Judge erred in finding the attachment of the beer to be otherwise.

The *next* point we have to cousider is the procedure of the lower Court. It is the duty of every Judge to exercise the powers vested in him in such a way as to give effect to all provisions of the law. Therefore, when a Civil Court attaches property of a nature governed by any special law, such as the Indian Arms Act, the Opium Act, the Excise Act, or the like, such Court is bound to proceed with great circumspection so as not to defeat any of the purposes for which such special law was enacted. In the present case the predecessor of the present District Judge of Jubbulpore entirely failed to use such circumspection. An application was made to him to attach a brewery, its plant, and some beer. The Judge allowed the application to be treated in a routine form as if the Excise Act, 1896, had no existence, and signed a general order written by his clerk for the issue of a warrant of attachment against the whole property. The Judge took no heed of the provisions of the Civil Procedure Code requiring him to protect so perishable an article as beer, whether fermented or half fermented—he ignored the rights

(1) 32 B. 157; 10 Bom. L. R. 13.

of a third party, namely, the Government having a pecuniary interest, *i. e.*, a claim for royalty, on the attached goods—and he failed to see that a continuance of the business under authorised management was for the benefit of all concerned, including the decree-holder. We can only explain these omissions by the supposition that the Judge responsible for them being on the eve of retirement had become inert. We must express our disapproval of such want of circumspection. Notice of the attachment should have been given to the Collector and his assistance invited in regard to the preservation and due disposal of the property. The Receiver of the Court should have been the judgment-debtor and not the decree-holder. Such powers as the Code gives the Court for the harvesting of agricultural produce attached in execution of a decree are not wanting in regard to other kinds of property which call for special treatment, *e. g.*, property subject to the Excise Laws. The hogsheads of beer were certainly heavy and bulky property within the Judicial Commissioner's Civil Circular No 1-31. We feel bound to note, however, that the judgment-debtor made no effort to assist the Court in any way. His manager seems to have plotted to set up a claim for damages against the decree-holder. He made no application of any kind to the Court on his own behalf, and the Excise Commissioner is in error in thinking that it was on his application that the beer was released from attachment. The facts were as given above, and we consider that the conduct of the decree-holder was entirely free from blame for any spoiling of beer that may have taken place. From the first he was anxious that the judgment-debtor should look after the beer, and it seems to us that the latter deliberately abstained from doing so.

The only other point requiring consideration is the form in which the Collector's intervention was made. As to that we feel bound to endorse the remarks of the Bombay High Court at page 162 of the ruling above cited.

The papers will now be returned to the District Court, which will proceed with the execution sale and dispose of the same according to law. If any beer should be attached or re-attached the fact will be notified to the Collector and his co-operation invited in order that the claims of Government for royalty may be safeguarded, and the provisions of the Excise Act may be given effect to consistently with those of the Code of Civil Procedure. Where the respective duties of two different branches of Government meet in respect of the same subject-matter, co-operation in furtherance, and not conflict in defeat, of both sets of duties is the proper administrative course.

In conclusion we maintain the order of attachment as perfectly legal, though improperly carried out in the first instance. There will be no order for costs of this revision.

Order of attachment maintained.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 989 OF 1914.

April 1, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Seshagiri Aiyar.

OOPPATH NARAMPARAMBATH KUTTAN *alias* KUNHAMAN AND ANOTHER —DEFENDANTS NOS. 4 AND 5—APPELLANTS

versus

V. P. M. P. V. KOYAKUTTY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 76 (c)—Mortgagor bound to pay Government revenue—Revenue falling into arrears—Sale of property, whether liable to be set aside.

Section 76 (*c*) of the Transfer of Property Act does not apply where the deed of mortgage distinctly provides that the Government revenue shall be paid by the mortgagor. [p. 345, col. 1.]

Where, therefore, it was an express condition of a deed of mortgage that the Government revenue need not be paid by the mortgagee and the property was put up to sale on account of the revenue falling into arrears, on a suit for redemption brought by the assignee of the mortgagor:

Held, that as the mortgagee was not bound by law to pay the revenue, the purchaser was not guilty of any fraud and the sale could not be set aside. [p. 345, col. 2.]

Sadanand v. *Ratanaji*, (1886) Bom. P. J. 68, followed.

Nawab Sidhee Nuzur Ally Khan v. *Rajah Ojoodhyaram Khan*, 10 M. I. A. 540; 5 W. R. (P. C.) 83; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198; 19 E. R. 1076, distinguished.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 939 of 1912, preferred against that of the Court of the District Munsif of Parappanangadi, in Original Suit No. 278 of 1911.

Mr. *K. P. M. Menon*, for the Appellants.

Mr. *A. V. K. Krishna Menon*, for the Respondents.

JUDGMENT.—The assignor of the plaintiff obtained a mortgage from the *jenmi* in 1893. In 1894, the said mortgagee sub-mortgaged a portion of the properties to the predecessor-in-title of defendants Nos. 1 to 3 (Exhibit A). The Government revenue due upon the property fell into arrears, and it was put up to sale. One Eressan Nair, who, it is alleged, was only a *benamidar* for the sub-mortgagee, purchased it in 1900. There was a partition among the members of the sub-mortgagee's family, and the property in dispute fell to the share of the 2nd defendant. Defendants Nos. 4 and 5 have purchased it from the 2nd defendant. Plaintiff, claiming to stand in the shoes of the mortgagee, sues to redeem; the Courts below have given him a decree.

We are unable to agree with the conclusion at which they have arrived. The deed of mortgage, Exhibit B, distinctly provides that the Government revenue shall be paid by the mortgagor, the *jenmi*. Reference to this document is made in Exhibit A, which sub-mortgages only a portion of the property covered by Exhibit B. We are, therefore, of opinion that section 76, clause (*c*), Transfer of Property Act, is not applicable. The mortgagor did enter into "a contract to the contrary", namely, that the revenue need not be paid by the mortgagee in possession. The sub-mortgagee was asked in his deed to pay the *jenmi* only the rent payable by the mortgagee. "The contract to the contrary" in Exhibit B must be taken to have been incorporated in Exhibit A. Consequently, there was no obligation on the part of defendants Nos. 1 to 3 to pay the arrears, although they were entitled to do so, if they liked. See *Sadanand* v. *Ratanaji* (1).

The lower Appellate Court quotes *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan* (2) for holding that the defendants are not entitled to rely upon the revenue sale. That case has no application to this second appeal. It was found in that case that the mortgagee, who was bound to protect the property from sale, wilfully made default in paying the revenue and was also guilty of other fraudulent acts. In the present case it was conceded that the only fraud alleged and proved is the non-payment of the arrears of revenue. We have found that as there was a contract to the contrary, the sub-mortgagee was not bound by law to pay the arrears. Consequently the purchaser was not guilty of any fraud. As the mortgage is no longer subsisting, the plaintiff is not entitled to redeem. We ought to point out that the *jenmi* is no party to this litigation.

On the ground that there is no mortgage to be redeemed, we must reverse the decrees of the Courts below and dismiss the suit with costs in all the Courts. The claim for arrears of Purappad, if any, will not be affected by this decision.

Appeal allowed.

(1) (1886) Bom. P. J. 68.

(2) 10 M. I. A. 540; 5 W. R. P. C. 83; 1 Suth. P. C. J. 635; 2 Sar. P. C. J. 198; 19 E. R. 1076.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 36 OF 1913-14 OF ALIGARH DISTRICT.

March 1, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

CHATAR BHUJ—PLAINTIFF—APPELLANT

versus

BASDEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 181—Decree, ex parte, by a Commissioner—Appeal against such decree, when maintainable.

Under section 181 of the Agra Tenancy Act an appeal lies to the Board against an appellate decree passed *ex parte* by a Commissioner when he has reversed or modified the decree appealed against to him. [p. 345, col. 2.]

Second appeal from an order of the Commissioner of the Agra Division, dated the 29th May 1914, reversing that of the Assistant Collector of Aligarh District.

JUDGMENT.

HOLMS, S. M. (*February 20th*, 1915.)—Under section 100 (2) of the Code of Civil Procedure, an appeal lies to the High Court against an appellate decree passed *ex parte*, and under section 181 of the Tenancy Act, apparently an appeal lies to the Board for similar reasons when the Commissioner has reversed or modified the decree appealed against to him. I was at

first very doubtful whether to hear this appeal on the merits, as it would appear that the appellant's proper course was to apply to the Commissioner for a review of his judgment if there were good reasons for his not being present before the Commissioner. I find, however, there is a decision of the High Court, *Ajudhia Prasad* v. *Balmukand* (1), against this view, which is referred to at page 394 of Mr. Woodroffe's Commentary on the Code of Civil Procedure. The respondent has no ruling to quote to the contrary. Despite this ruling I would have been loath to send the case back, but the findings of the Commissioner are not very clear. The Commissioner has found definitely that there is no evidence to show what the tenant's period of occupancy was in 1890 at the time the *kabuliat* was said to have been executed. The burden of proof was on the tenant to show that he had twelve years' occupancy at the time of the lease, and he has not discharged it. As regards the *kabuliat*, the Commissioner has come to no very definite finding.

I would, therefore, set aside the order of the Commissioner and direct that he re-hear the appeal, coming to a definite finding as to whether the tenant held under *kabuliat*. As the appellant has entirely failed to show any reason for his non-appearance before the Commissioner, whatever the result of the appeal may be, he should bear the respondents' costs in both Appellate Courts, and if the Commissioner allows the appeal, he should also bear the respondents' costs in the Assistant Collector's Court also.

CAMPBELL, J. M.—I agree.

Appeal allowed; Cause remanded.

(1) 8 A. 354; A. W. N. (1886) 110.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 708 OF 1912.

December 8, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

KHIALIA SHAH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

HANSARI MAL-NATHU MAL—PLAINTIFFS—RESPONDENTS.

Interest– Hundi *not paid at maturity—Trade usage—Creditor, whether entitled to appropriate payment towards interest.*

It was proved as a well-recognised rule in the city of Rawalpindi that if interest was charged on a *hundi* and such *hundi* was not paid at maturity the same rate of interest continued to be payable:

Held, that plaintiffs were entitled to appropriate all payments made by the defendants towards the interest, whenever the amount of such interest due at the time of any payment absorbed the sum paid. [p 347, col. 1.]

Second appeal from a decree of the Divisional Judge, Rawalpindi Division, dated the 13th January 1912.

Messrs. *Nand Lal* and *Rama Nand*, for the Appellants.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the Divisional Judge from which this further appeal has been preferred. The grounds upon which that judgment, so far as it is adverse to appellants, is impeached are—

(*i*) that the Divisional Judge erred in allowing interest *post diem* at the rate of 12 per cent. per annum upon the basis of a trade usage to that effect, inasmuch as plaintiffs in their plaint had made no reference to any such usage and the evidence adduced by plaintiffs in support of its existence was wholly insufficient; and

(*ii*) that the learned Judge was also in error in holding that plaintiffs were entitled to credit payments made by defendants towards interest.

We have heard Mr. Rama Nand at some length on behalf of appellants, but his arguments failed to convince us that either contention was correct.

It is true that the plaint makes no mention of any trade usage as to the rate of interest in cases such as the present, but it is clear from issues 4 and 5 and from the evidence adduced by the parties that both sides were well aware during the course of the trial that plaintiffs relied upon the existence of such usage.

In support of their contention that a usage of the kind existed in Rawalpindi, plaintiffs called two witnesses, Lala Bhagwan Das and Lala Ram Bhaj, who deposed that it was a well-recognised rule in that city that if interest was charged on a *hundi* and such *hundi* was not paid at maturity, the same rate of interest continued to be payable.

Both these witnesses deal in *hundis* and appear to be respectable merchants and bankers in no way connected with, or interested in, plaintiffs. Their evidence has been accepted by both the District Judge and the Divisional Judge and we see no reason to take a different view.

All that Mr. Rama Nand could urge against them was that they did not deal *exclusively* in the business of *hundis*, a criticism which struck us as singularly devoid of force. The evidence of Mathra Das (D. W. No. 1) in no way shakes the testimony of the plaintiffs' witnesses, as all that that witness could depose to was that in one of his cases this Court had held that section 80 of the Negotiable Instruments Act applied. But in that case no attempt had been made to prove the existence of any usage, and the question was decided merely with reference to the provisions of the Act and without any discussion.

We accordingly overrule the first point urged by Mr. Rama Nand.

As to the *second* question, we need say very little. It was clearly incumbent upon defendants to prove that when they made payments to their creditors (the plaintiffs), they notified the latter that such payments were to be credited towards the principal amount and not towards interest, and that it was upon this understanding that plaintiffs received the sums of money paid from time to time (see sections 59 and 60 of the Indian Contract Act). Defendants have entirely failed to discharge this onus and, as the Divisional Judge remarks, all that they have been able to show is that in their own books they entered the sums as paid towards reduction of the principal amount.

In a case such as this, it cannot reasonably be *implied* that the circumstances were such as to indicate that the payment was towards the principal and was accepted in that light by plaintiffs. On the contrary, it is hardly likely that a creditor to whom interest as well as the principal amount was due would accept a payment in reduction of the principal and leave the interest outstanding.

We agree, therefore, with the Divisional Judge in holding that in the circumstances plaintiffs were entitled to appropriate all payments towards the interest, whenever the amount of such interest due at the time of ny payment absorbed the sum paid.

The result is that the appeal fails and is dismissed with costs

Appeal dismissed.

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ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 2 OF 1915.

April 28, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Piggott.

ABDUL GAFFAR—DEFENDANT—APPELLANT

versus

NUR JAHAN BEGUM—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 120—Debt due to deceased received by one of his heirs—Suit by other heirs to recover their share—Limitation.

A suit by one of the heirs of a deceased person to recover his share of the debt due to the deceased, which had been realized by another heir holding succession certificate, is governed by Article 62, and not Article 120 of the Limitation Act. [p. 348, col. 2.]

First appeal from an order of the District Judge of Budaun, dated the 18th November 1914.

Mr. *A. Haider*, for the Appellant

The Hon'ble Dr. *Sundar Lal*, for the Respondent.

JUDGMENT.—This is an appeal against an order of remand passed by the District Judge of Budaun. The facts are that one Najmuddin died in July 1901 leaving a widow, Zebunnissa, a brother, Hamiduddin, and two nephews, Abdul Gaffar and Zahiruddin. In March 1903 Abdul Gaffar obtained a succession certificate in respect of the debts due to the deceased. Zahiruddin died in 1906 and his rights devolved directly or indirectly upon the plaintiff-respondent, Nur Jahan Begam, who in July 1913 brought the present suit against Abdul Gaffar claiming an account of all sums received by him as holder of the succession certificate and payment of what might be found due to her. The Subordnate Judge dismissed the suit, holding that it was governed by Article 62 of the first Schedule to the Limitation Act, and was barred by that Article, inasmuch as it was proved that no sum had been received by Abdul Gaffar within three years of the suit. On appeal the District Judge held

that the suit was governed, not by Article 62, but by Article 120 and remanded the suit for trial on the merits.

The District Judge has relied upon the decision of this Court in *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1). The facts of that case do not differ in essential particulars from the facts of the present case, except that the defendant in the present case obtained a succession certificate whereas the defendant in that case does not seem to have done so. The Court was disposed to follow the decision in *Kundan Lal* v. *Bansi Dhar* (2), but considered itself bound by the decision of the Privy Council in *Mahomed Riasat Ali* v. *Hasin Banu* (3) to hold that the suit was governed by Article 120. It seems to us that the decision of the Privy Council in the case mentioned had no application to the facts of the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1). The case before the Privy Council was one in which the widow of one Mosheraf Ali claimed the moveable and immoveable property of her husband from a brother of the deceased who had taken possession. Their Lordships held that the claim to cash and moveables was governed by Article 120. Article 62, which, of course, had no application to the claim for moveables, does not seem to have been mentioned at all. The cash in question had not been received from any one, but had been seized by the defendant upon his brother's death. We do not think that the decision of the Privy Council obliges us to hold that such a case as this is governed by Article 120. In the recent case of *Amina Bibi* v. *Najmunnissa Bibi* (4), it was held that a suit like the one before us was governed by Article 62. In his judgment in that case Tudball, J., referring to the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1), said that Article 62 was not mentioned at all in the judgment in that case, but he must have overlooked the last paragraph of the judgment at page 172 of the report, where Article 62 was mentioned and was held to be inapplicable on the strength of the decision of the Privy Council. The decision in the case of *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (1) is a direct authority in favour of the respondent's contention, but for the reason already stated we think that the Court was wrong in supposing that the point was covered by the decision of the Privy Council. We prefer the later decision in the case of *Amina Bibi* v. *Najmunnissa Bibi* (4), which is supported by the decisions in *Parsotam Rao* v. *Radha Bai* (5), *Masihuddin* v. *Imtiazunnissa Bibi* (6) and *Mahomed Wahib* v. *Mahomed Ameer* (7). The circumstance that the defendant-appellant held a succession certificate does not appear to us to differentiate the case from cases in which one of several heirs receives payment of a debt due to the deceased, though he does not hold a succession certificate.

In our opinion the Subordinate Judge was right in holding that the suit was barred by limitation. We allow this appeal, set aside the order of the District Judge and dismiss the suit with costs throughout. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(1) 19 A. 169; A. W. N. (1897) 34.
(2) 3 A. 170.
(3) 21 C. 157; 20 I. A. 155.
(4) 27 Ind. Cas. 712; 13 A. L. J. 255; 37 A. 233.
(5) 28 Ind. Cas. 953; 13 A. L. J. 407.
(6) 27 Ind. Cas. 533; 12 A. L. J. 1256; 37 A. 40.
(7) 32 C. 527; 1 C. L. J. 167.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 819 OF 1912.

December 8, 1914.

Present:—Mr. Justice Rattigan and Mr. Justice Scott-Smith.

DALIP SINGH—PLAINTIFF—APPELLANT

versus

RANNIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Adverse possession—Non-occupancy tenants paying no rent and holding over after termination of lease—Attempt to get themselves recorded as proprietors.

Where plaintiffs' predecessors were originally lessees of *shamilat* lands, but on the termination of their lease in 1865 continued to be in possession and were shown in the Revenue Records as non-occupancy tenants and in 1881 claimed without success to be recorded as proprietors:

Held, (1) that the mere fact of their never paying any rent except the land revenue and cesses did not of itself constitute them proprietors; [p. 349, col. 1.]

(2) that their adverse possession could not be said to have begun in 1881, as after their failure to get themselves recorded as proprietors they

continued to cultivate the lands and pay the land revenue and cesses as before. [p. 349, col 2.]

Kantheppa Raddi v. *Sheshappa*, 22 B. 893; *Chandri* v. *Daji Bhau*, 24 B. 504; 2 Bom. L. R. 491, distinguished.

Second appeal from a decree of the Divisional Judge, Ludhiana, dated the 29th February 1912.

Bhagat *Gobind Das*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This judgment disposes of two Appeals Nos. 819 and 820 of 1912. The suits out of which they arise were brought by the plaintiffs-appellants for a declaration that certain lands situated in village Lidhran in the Ludhiana District, of which they were shown in the Revenue Records as non-occupancy tenants, were owned by them. The Courts below have dismissed the plaintiffs' suits and they have filed second appeals to this Court.

It appears that the plaintiffs' predecessors were originally lessees (*mustajars*) of these lands and that their lease terminated in 1865, but they continusd to be in possession and were shown in the Revenue Records as non-occupancy tenants, the lands being part of the *shamilat-deh*. In 1881 they claimed to be proprietors, and not mere tenants of these lands.

The proprietors of the village, on the other hand, maintained that the plaintiffs were mere tenants and that the lands were part of the *shamilat-deh*. The Revenue Officers refused to make any alteration in the records and the entries remained as before.

We may admit for the sake of argument that the plaintiffs have never paid any rent, except the land revenue and cessss, but this fact of itself would not constitute them proprietors, for it is quite consistent with their being occupancy tenants under section 5, Act XVI of 1887.

Mr. Gobind Das, in arguing the case for the appellants, lays great stress on what occurred in 1881. He says that at that time his clients' predecessors set up an adverse claim to proprietary rights, and that since then they have been holding adversely to the defendants. He relies on *Kantheppa Raddi* v. *Sheshappa* (1) and *Chandri* v. *Daji Bhau* (2). In the latter it was held that a tenan holding over after the expiration of the term mentioned in his rent-note is a tenant by sufferance and there is no such relationship between the landlord and such tenant as is contemplated by Article 139, Schedule II, of the Limitation Act. Also, that the possession of the tenant holding over is wrongful, and if there is no evidence from which fresh tenancy can be inferred in the strict sense of that term, time begins to run against the landlord when the period of the fixed lease expires.

With all due respect, we think that the Judges have probably gone rather too far in the case referred to. The facts, however, are not on all fours with those of the present case.

Here we find that the plaintiffs' predecessors made an attempt in 1881 to get the entries in the Revenue Records amended in their favour, but failed. Thereafter matters continued as before, the plaintiffs' predecessors continued to cultivate the lands and to pay the land revenue and cesses. The inference which we draw from this is that the plaintiffs gave up their claims to proprietary rights, having failed in their attempt to get the entries modified. The village proprietors did not realise any rent from the tenants before 1881, and they did not realise any after that date beyond the land revenue and cesses due upon the lands.

We, therefore, agree with the Court below that the possession of the tenants did not become adverse to the landlords after 1881. Mr. Gobind Das also urges that some of the defendants have held land as tenants under his clients, but this also does not amount to an admission of the plaintiffs' *proprietary* rights. The appeals fail and are dismissed with costs.

Appeal dismissed.

(1) 22 B. 893.
(2) 24 B. 504; 2 Bom. L. R. 491.

KHEMESH CHANDRA *v.* ABDUL HAMID.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEALS NOS. 2627 TO 2629 OF 1909 AND 1419 OF 1912.

March 19, 1915.

Present:—Mr. Justice N. Chatterjea and Mr. Justice Mullick.

KHEMESH CHANDRA RAKSHIT—*Pro forma* DEFENDANT No. 26—APPELLANT

versus

ABDUL HAMID—PLAINTIFF—RESPONDENT.

Bengal Land Revenue Sales Act (XI of 1859), ss. 13, 54, scope of—Sale, what passes by—Purchaser, rights of—Adverse possession—Incumbrance, acquisition of rights in respect of.

At a sale under section 13, Bengal Land Revenue Sales, Act XI of 1859, it is not the rights of the recorded proprietor that pass, but the share itself. [p. 352, col. 1.]

Obiter.—A Hindu widow in possession of a share of an estate as the heiress of her husband or her father represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life-estate. [p. 351, col. 2.]

Dabi Das Chowdhuri v. *Bipro Charan Ghosal*, 22 C. 641 and *Banalata Dasi* v. *Monmotha Nath Goswami*, 11 C. W. N. 821, referred to and followed.

Adverse possession against the defaulter, whether for the statutory period or for a lesser period, does not bind the purchaser of a share, who is not a person claiming from or through the defaulter. [p. 351, col. 2.]

Bilas Chandra Mukherjee v. *Akshay Kumar Das Sarkar*, 14 Ind. Cas. 219; 16 C. W. N. 587; 15 C. L. J. 436, referred to.

It is not the right, title and interest of the previous owner of the share which pass to the purchaser under section 54, but the share as recorded in the Collector's book, on which the revenue is assessed. [p. 352, col. 2.]

The words "shall not acquire any rights" in section 54, Bengal Land Revenue Sales Act, refer to the acquisition of rights in respect of interests, such as incumbrances or the like, which are referred to in the previous phrase of that section. [p. 353, col. 1.]

APPEAL No. 2628 OF 1909.

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 18th June 1909, reversing the decision of the Additional Munsif, Satkania, dated the 23rd November 1908.

APPEAL No. 1914 OF 1912.

Appeal against the decree of the Subordinate Judge, Chittagong, dated the 27th February 1912, reversing a decision of the Munsif, Satkania, dated the 15th December 1913.

Babus *Mohendra Nath Roy*, *Dhirendra Lall Kastgir* and *Khitish Chandra Sen*, for the Appellant.

Babus *Joges Chandra Roy* and *Probodh Coomar Dass*, for the Respondent.

JUDGMENT

IN No. 1419.

The question for decision in this appeal is, what is the extent of share which passed to the plaintiff, at a sale held under section 13 of Act XI of 1859.

It appears that a 14 annas 9 pies share of an estate belonged to one Mofizar Rahaman. Mofizar Rahaman died leaving two sons, Fazor Rahaman and Dula Meah, a widow and three daughters. Under the Muhammadan Law the two sons got one half (a quarter each) and the widow and the daughters the other half of the estate. On the 29th October 1886 Fazor Rahaman got himself and his brother Dula Meah, who was then a minor, registered in the Collectorate with respect to the whole of the 14 anns 9 pies share, ignoring his mother and sisters who may be conveniently referred to as the females.

These females, however, on the 21st March 1893 obtained an order for registration of their names in respect of one-half of 14 annas 9 pies share, that being their shares in the estate left by Mofizar Rahaman.

On the 7th June 1893, the plaintiff purchased the interest of Fazor Rahaman at a sale held in execution of a money decree and got himself registered with respect to 7 annas $4\frac{1}{2}$ pies share, although that share included the share of Dula Meah. On the 25th March 1897, the share of Dula Meah was purchased by one Wasek Ali, and he also got his name registered with respect to 7 annas $4\frac{1}{2}$ pies share, although Dula Meah's share was only one half of that.

Now after the females got their names registered with respect to 7 annas $4\frac{1}{2}$ pies share, Wasek Ali, as purchaser of Dula Meah's interest, ought to have bsen recorded as owner of one-half of 7 annas $4\frac{1}{2}$ pies share, and the share registered in the name of the plaintiff also ought to have been reduced to one-half of 7 annas $4\frac{1}{2}$ pies share. In the general register, however, the females were recorded as owners of 7 annas $4\frac{1}{2}$ pies share and Wasek Ali and the plaintiffs were recorded as owner of 7 annas $4\frac{1}{2}$ pies each. The total, therefore, (treating the 14 annas 9 pies as 16 annas) amounted to 24 annas.

It appears that sometime before 1895, the plaintiff got a separate account opened in respect of 7 annas $4\frac{1}{2}$ pies share with a

proportionate Government revenue and it was called *hissya* No. 2.

The shares of the females together with that of Wasek Ali (purchaser of Dula Meah's interest) were formed into a separate account consisting of 7 annas $4\frac{1}{2}$ pies share with a proportionate Goverment revenue and was known as *hissya* No. 5.

Both the *hissyas* Nos. 2 and 5 were sold for arrears of revenue under section 13 of Act XI of 1859, on the 4th March 1898, and *hissya* No. 2 (which formerly belonged to him) was purchased by the plaintiff, and *hissya* No. 5 was purchased by the defendant.

It appears from the judgment of the Court below, that a person claiming the interest of the females in the estate has lost his suit as against the plaintiff and the defendant, by reason of these sales for arrears of revenue. We are not, therefore, concerned with the shares of the females, and the only question now is whether the plaintiff by his purchase of *hissya* No. 2 acquired only one-half of 7 annas $4\frac{1}{2}$ pies share (that being the share which originally belonged to Fazor Rahaman and subsequently to the plaintiff under his purchase in execution of the money decree) or the entire 7 annas $4\frac{1}{2}$ pies share covered by separate account No. 2.

The question turns upon the construction of section 54 of Act XI of 1859, which runs as followes :—"When a share or shares of an estate may be sold under the provisions of section 13 or section 14, the purchaser shall acquire the share or shares subject to all incumbrances and shall not acquire any rights which were not possessed by the previous owner or owners."

It is contended on behalf of the appellant that the words "shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser shall not acquire any rights which were not possessed by the previous owner at any time previously, and that as Fazor Rahaman or the plaintiff never possessed more than a moiety of 7 annas $4\frac{1}{2}$ pies share, the plaintiff as purchaser at the revenue sale could not acquire a title to more than that share. On the other hand, it is contended on behalf of the respondents, that the purchaser acquires the share itself which is put up for sale, irrespective of the extent of the share of the person whose name was recorded in the separate account.

The rights of the purchaser, under section 54, Act XI of 1859, have been considered in several cases by this Court. In *Dabi Das Chowdhuri* v. *Bixro Charan Ghosal* (1), where an estate held by a Hindu widow was sold for arrears of revenue, and it was contended that under section 54 the purchaser did not purchase any estate which lasted longer than her life-time, Pigot, J., after referring to the provisions of section 13 observed: "It is plain that as the result of a sale under section 13, it is contemplated that the whole share in respect of which the arrear may have been due shall pass to the purchaser; and that confirms the impression which, upon reading section 54 alone, one would be disposed to form with regard to its meaning that the words 'shall not acquire any rights' in that section refer to the acquistion of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase of that section. We are, therefore, of opinion that the entire estate passed upon the sale for arrears of revenue under section 54, and that the purchaser did not take any interest limited to the life of Satanmani." No doubt a Hindu widow in possession of a share of an estate as the heiress of her husband or her father represents the full owner's interest and the purchaser of such a share acquires the share itself, and not merely a life-estate, and this is the ground upon which Brett and Sharf-ud-din, JJ., based their decision in *Banglata Dasi* v. *Monmotha Nath Goswami* (2). Pigot and Stevens, JJ., however, in the case cited above based their judgment upon a construction of the section and held that the words "shall not acquire any rights" which were not possessed by the previous owner or owners" refer to the acquisition of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase.

It has also been held that adverse possession against the defaulter, whether, for the statutory period or for a lesser period does not bind the purchaser of a share, and that

(1) 22 C. 641.
(2) 11 C. W. N. 821.

the purchaser is not a person claiming from or through the defaulter. See *Kumar Kalanand* v. *Syed Sarafat Hossein* (3), *Rahimuddi Munshi* v. *Nalini Kanta Lahiri* (4) and *Bilas Chandra Mukherjee* v. *Akshay Kumar Das Sarkar* (5). See also *Bhawani Koer* v. *Mathura Prasad* (6).

The authorities clearly show that at a sale under section 13 of Act XI of 1859 it is not the rights of the recorded proprietor that pass, but the share itself.

Reliance was placed on behalf of the appellant on the case of *Annada Prosad Ghose* v. *Rajendra Kumar Ghose* (7). In that case, the plaintiff, who purchased in execution of a money decree the rights of the defaulter in whose name a separate account had been opened in respect of a share of an estate, sued for declaration of his title to, and recovery of possession of, the share against the purchaser there at a revenue sale, and it was contended on his behalf that the words "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners" mean that the purchaser at a revenue sale only acquires the rights possessed by the previous owner or owners *at the date of the sale*. Such a contention, if upheld would lead to the result that if the previous owner parts with all his rights before the share is put up for sale for arrears of revenue, the purchaser at such a sale acquires nothing, and the learned Judges (Rampini and Pratt, JJ.) overruled the contention. In doing so, however, they held that the words quoted above meant that "the purchaser shall not acquire any rights not possessed by the previous owner or owners at some time or another." It is upon this passage of the judgment that the appellant relies, and it is contended that as the previous owner of *hissya* No. 2 never had rights to anything more than one half of 7 annas $4\frac{1}{2}$ pies share, the plaintiff could not, by his purchase of *hissya* No. 2, acquire a title to the entire 7 annas $4\frac{1}{2}$ pies share. No doubt there is the passage in the judgment, but then the learned Judges also said with reference to the interpretation sought to be placed upon the section, "To put such an interpretation upon these words would be to entirely ignore the policy of the revenue law, which is to protect the revenue and make the share, on which the revenue is assessed, available for the arrears of revenue due upon it," and they quoted with approval the observation of Phear, J., in the case of *Ganga Deen Misser* v. *Kheroo Mandal* (8), "The sale of the Collector passes to the purchaser the share of the defaulting shareholder of the entire estate as it was registered in the Collector's books," and, "It was not the intention, we think, of the Legislature to introduce uncertainty of this kind into auction-sales held for the purpose of realizing revenue. On the contrary, it is rather the general principle of the Legislature to make these sales effective to pass the full share of the defaulting shareholder free, so to speak, of all incumbrances."

In none of the cases which we have referred to, was there any question of the extent of the share which belonged to the person in whose name the separate account of the share of the estate was opened, but these authorities establish the proposition that it is not the right, title and interest of the previous owner of the share which pass to the purchaser under section 54, but the share as recorded in the Collector's book, on which the revenue is assessed. It is true Phear, J., refers to the "full share of the defaulting shareholder." In the present case although Fazor Rahaman and subsequently the plaintiff as purchaser of his interest had only a moiety of 7 annas $4\frac{1}{2}$ pies, the separate account was opened with respect to the whole 7 annas $4\frac{1}{2}$ pies share in the name of the plaintiff with a proportionate Government revenue. The other moiety belonged to Dula Meah, and the name of Wasek Ali, the purchaser of his interest, ought to have been recorded in that separate account, but was entered in the separate account No. 5 along with the names of the females. But the 7 annas $4\frac{1}{2}$ pies share was formed into the separate account No. 2 with a proportionate Government revenue, and not with a moiety of the revenue payable for that share. And if the policy of the revenue law is to protect the

(3) 12 C. W. N. 525.
(4) 1 Ind. Cas. 81; 13 C. W. N. 407.
(5) 14 Ind. Cas. 219; 16 C. W. N. 587; 15 C. L. J. 436.
(6) 7 C. L. J. 1.
(7) 29 C. 223; 6 C. W. N. 375.
(8) 14 B. L. R. 170; 22 W. R. 449.

revenue and make the share on which the revenue is assessed available for the arrears of revenue assessed upon it, as we think it is, the whole of the 7 annas $4\frac{1}{2}$ pies share when it fell into arrears, became liable to be sold for such arrears, although the person recorded as the owner of that share had right to only a moiety of it.

We agree with the view taken by Pigot, J., in *Dabi Das Chowdhuri* v. *Bipro Charan Ghosal* (1) [followed by Mookerjee, J., in *Bhawani Koer* v. *Mathura Prasad* (6)] *viz.*, that the words "shall not acquire any rights" in section 54 refer to the acquisition of rights in respect of interest, such as incumbrances or the like, which are referred to in the previous phrase of that section. It is to be observed that a separate account is opened under Act XI of 1859, after service of notice to the other share-holders. It is pointed out however on behalf of the appellant that section 69 of the Land Registration Act provides that no separate account shall be opened under the provisions of section 10 or 11 of Act XI of 1859 in respect of the share of any applicant under the said section otherwise than for a share corresponding with the character and extent of interest in the estate, in respect of which such applicant is recorded as proprietor or manager under the Land Registration Act, and that, therefore, *hissya* No. 2 ought not to have been opened with respect to 7 annas $4\frac{1}{2}$ pies share in the name of the plaintiff when he applied for opening of a separate account of his share. But as already stated, in the general register the plaintiff was registered with respect to 7 annas $4\frac{1}{2}$ pies; Wasek Ali and the females also were recorded each with respect to a similar share, the total shares thus amounting to more than 16 annas. That no doubt was a mistake, but the separate accounts were opened several years before the *hissyas* were put up to sale, one in the name of the plaintiff for a 7 annas $4\frac{1}{2}$ pies share, and the other in the name of Wasek Ali and the females for a 7 annas $4\frac{1}{2}$ pies with proportionate Government revenues. Neither Wasek Ali nor the females appear to have ever taken any steps to have the mistake corrected. The *hissya* No. 2 consisting of the whole of 7 annas $4\frac{1}{2}$ pies stood in the name of the plaintiff, though erroneously, and when the Government revenue for that share fell into arrears, the Collector put up that *hissya* for sale, and if we are to hold that the entire *hissya* No. 2 did not pass to the purchaser because the person in whose name it stood recorded did not possess the entire 7 annas $4\frac{1}{2}$ pies share, we would be introducing uncertainty into auction sales for the purposes of realizing revenue which, as pointed out by Phear, J., was not the intention of the Legislature.

Lastly, it was contended on behalf of the appellant, that the Court of first instance having found that sale of *hissya* No. 2 was brought about by the plaintiff fraudulently, the Court of Appeal below ought to have come to a finding upon the point, and it is wrong in holding that no question of fraud or mistake comes in. But the only ground upon which the Court of first instance found that the revenue sale was brought about by the fraud of the plaintiff, is that he took no steps to have the mistake in the matter of separate account having been opened in respect of a 7 annas $4\frac{1}{2}$ pies share rectified. But the separate accounts were opened several years before the sale for arrears of revenue, and we cannot say that there was any obligation on the part of the plaintiff to have the mistake corrected for the benefit of Wasek Ali or persons representing him.

We are not concerned with a consideration of the rights of the females. As already stated, the purchaser of their rights has been held in a previous suit to have lost his rights by reason of the revenue sales, and both the plaintiff and the defendant were parties to that suit.

We are of opinion that the entire 7-annas $4\frac{1}{2}$-pies share constituting *hissya* No. 2 passed to the plaintiff at the sale for arrears of revenue, and this appeal will accordingly be dismissed with costs.

IN NOS. 2627 TO 2629.

These appeals arise out of suits for rent in respect of 7-annas $4\frac{1}{2}$-pies share instituted by the plaintiff as purchaser of *hissya* No. 2. Having regard to our decision in Appeal No. 1419 of 1912, we think these appeals must also be dismissed with costs.

Appeals dismissed.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1510 OF 1912.
December 16, 1914.
Present:—Mr. Justice Rattigan and
Mr. Justice Scott-Smith.
PANNA LAL—JUDGMENT-DEBTOR—APPELLANT
versus
NATHA SINGH—DECREE-HOLDER—RESPONDENT.

Punjab Pre-emption Act (II of 1905), ss. 10, 19—Money deposited in Court by plaintiff-pre-emptor, attachment of—Liability of plaintiff to pay up deficiency.

The plaintiff-pre-emptor deposited Rs. 400 in Court under section 19 of the Punjab Pre-emption Act of 1905, but during the pendency of the suit Rs. 297 were, without the knowledge of the parties to the suit, withdrawn under an attachment at the instance of a person who had a decree against the plaintiff. The suit being decreed in favour of the plaintiff, he paid in the balance of the price fixed over and above Rs. 400, but was ordered to pay Rs. 297 more before getting possession:

Held, that under section 10 of the Act the money deposited by the plaintiff could not be attached, but as he had presumably benefited by Rs. 297 being paid over to one of his creditors, he was in equity bound to make good the deficiency. [p. 355, col. 1.]

Second appeal from an order of the Divisional Judge, Ambala, dated the 17th May 1912.

Lala *Sangam Lal*, for the Appellant.

Mr. *Gokal Chand Narang*, for the Respondent.

JUDGMENT.—The Appeals Nos. 1510 and 1596 of 1912 have arisen out of an order passed in execution of a decree for pre-emption. The facts are fully stated in the judgment of the lower Appellate Court.

Briefly they are that Natha Singh, plaintiff, was given a decree for pre-emption of certain land on payment of Rs. 2,000 payable to Panna Lal, vendee. By order of the Court he deposited Rs. 400 in Court under section 19 of the Punjab Pre-emption Act of 1905.

During the pendency of the suit, Rs. 297 cut of that sum were withdrawn under an attachment at the instance of a person who had a decree against Natha Singh. It does not appear that Natha Singh or Panna Lal had notice of this attachment and hence no objection was made to it.

After the suit was finally decided Natha Singh paid in the balance of the price as fixed by the Appellate Court. He has now been ordered to pay the sum of Rs. 297, removed under the attachment mentioned above, before he is given possession of the land decreed. Against this order he has filed a further appeal to this Court, and Panna Lal has also appealed asking that the suit should be dismissed as the price to be deposited was not paid into Court by due date.

Lala Sangam Lal who appeared for Panna Lal did not press that the suit should stand dismissed, but he urged half-heartedly that as Natha Singh had not as yet even paid in Rs. 297, the Court should not allow his decree to be executed. Natha Singh has complied with the decree and there is certainly no reason why his suit should be dismissed, while Panna Lal's interests have been sufficiently protected by the Court ordering Natha Singh to pay Rs. 297 more prior to execution.

Mr. Gokal Chand in arguing Natha Singh's appeal relies upon *Sant Singh* v. *Ghasita* (1), wherein *Sandha Khan* v. *Jhandu Khan* (2) was dissented from and it was held that money deposited in a Court to be paid to a vendee under a pre-emption decree cannot be withdrawn by an attachment under a decree of third party, and that a Court is not competent to pay it out to any one but the person entitled to it under the decree for pre-emption. In that case the plaintiff was not ordered to pay over again the money which had been withdrawn under an attachment. The whole of the money was paid after the decree had been passed and the *ratio decidendi* was that the plaintiff, immediately he had deposited the full amount in the Court, was entitled to the property decreed.

The present case is distinguishable, inasmuch as the money withrawn was a part of the deposit made under section 19 of the Punjab Pre-emption Act of 1905. At the time the plaintiff was not entitled to possession of the land, nor were the vendees entitled to remove any part of the money, and it could not be attached in accordance

(1) 21 P. R. 1902; 179 P. L. R. 1901.
(2) 61 P. R. 1890.

with section 10 of the Punjab Pre-emption Act of 1905, which provides that no sum deposited in or paid into Court by a pre-emptor under the provisions of this Act or of the Code of Civil Procedure shall, while it is in the custody of the Court, be liable to attachment in execution of a decree.

This provision of the law had not been enacted at the time of the decision reported as *Sant Singh* v. *Ghasita* (1), and, as already remarked, the present case is distinguishable, and we think that it should be decided in accordance with equity. The vendee is certainly in no way to blame for the money having been withdrawn, and we do not think that he should be forced to surrender the land till he is paid the full amount to which he is entitled. The plaintiff has presumably been benefitted by Rs. 297 being paid to one of his creditors. If no such sum of money was really due, he can seek redress by a regular suit. In our opinion the order of the Courts below was a correct one, and we dismiss both the appeals. Parties will bear their own costs in this Court.

Appeals dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1283 OF 1912.

February 17, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

HARI KRISHNA DAS—PLAINTIFF—APPELLANT

versus

DINOR KINLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Declaration of title, suit for—Nature of title to be ascertained first—Plaint, amendment of—Discretion exercised by lower Appellate Court—High Court, power of, to interfere.

A Court ought not to declare the title of any party to a piece of land without knowing what the nature of that title is. [p. 355, col. 2.]

A High Court ought not to interfere with the discretion deliberately exercised by a lower Appellate Court in refusing to allow a plaintiff to amend his plaint during the progress of the suit, unless it is satisfied that the lower Court came to a wrong conclusion. [p. 355, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Midnapore, dated the 10th of February 1912, affirming that of the Munsif, 2nd Court, Tamluk, dated the 18th of May 1911.

Babu *Hari Bhusan Mukherjee*, for the Appellant.

Babus *Sarat Chandra Khan* and *Hirendra Nath Ganguli*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Subordinate Judge of Midnapore affirming the decision of the Munsif. The suit was brought by the plaintiff for a declaration of his title to $1\frac{1}{2}$ *bighas* of land. The plaintiff has failed in both the Courts below. In the lower Appellate Court he was unsuccessful on the ground that he failed to define what was the nature of the interest in the land for which he asked the Court to make a declaration in his favour. In that, obviously, the learned Subordinate Judge was right. The plaintiff did not inform the Court whether the land which he claimed was held subject to the payment of rent or rent-free or in absolute interest or in any other more limited interest. The reasons are not far to seek when one looks into the judgment of the Court of first instance, because the plaintiff deliberately attempted to shift during the trial of the case the nature of the title which he claimed, and in this suit obviously the Court ought not to declare the title of the plaintiff without knowing what the nature of that title is. It is quite clear that the learned Subordinate Judge exercised a proper discretion when he declined to declare the plaintiff's title to a piece of land in which he did not know what interest the plaintiff had.

Then it is said that the application made by the plaintiff for amending the plaint ought to have been allowed. This is not the place where in the ordinary course a question of this nature should be decided. That is a matter purely within the discretion of the Judges of the lower Courts and they not having permitted such an amendment, we ought not, in the ordinary course, to interfere with the discretion deliberately exercised by the Judges of the Courts below, unless we are satisfied that they came to a wrong conclusion. From the course the case took in the Court of first instance, it

seems to me that these learned Judges exercised a wise discretion in refusing to allow the plaintiff to amend his plaint during the progress of the suit. In that view, the decision arrived at by the learned Subordinate Judge of the lower Appellate Court is correct. The present appeal, therefore, fails and must be dismissed with costs.

TEUNON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.
CIVIL APPEALS NOS. 141 AND 142 OF 1912.
March 19, 1915.
Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Sri RAJAH ROW VENKATA MAHIPATY GANGADHARA RAMA ROW BAHADUR —PLAINTIFF—APPELLANT IN NO. 141 & RESPONDENT IN NO. 142

versus

Sri RAJAH VENKATA KUMARA MAHIPATY SURYA RAO BAHADUR GARU *alias Sri* RAJAH RAO VENKATA KUMARA MAHIPATHY SURYA RAO BAHADUR GARU, RAJAH OF PITTAPUR—DEFENDANT—RESPONDENT IN NO. 141 & APPELLANT IN NO. 142.

Hindu Law—Impartible estate—Right of a junior member to maintenance—Co-parcenary right—Pittapur Zemindary—*Maintenance grant.*

The *Zemindary* of Pittapur is an impartible estate governed by the *Mithakshara* Law and descending by lineal primogeniture. [p. 356, col. 2]

The plaintiff's father was adopted by the late *zemindar* who by a Will and an agreement gave him a maintenance. On the *zemindar's* death the plaintiff's father sued to recover the *zemindary* on the ground that the Will was invalid and that the defendant was not the Raja's natural son. The Will was upheld and the suit was dismissed. The plaintiff seeking maintenance from the defendant but denying his co-parcenary relationship with the defendant:

Held, that the plaintiff was not entitled to any maintenance. [p. 360, col. 1; p. 361, col. 2.]

As the agreement with the plaintiff's father for maintenance did not expressly state that it was for the plaintiff's father and his heirs, it could not be construed to have made a permanent provision for the grantee and his descendants. [p. 370, col. 2.]

Prima facie, a provision for maintenance by a grant of money allowance is temporary. Grants to be construed as permanent provisions must be supported by unambiguous language or by a course of conduct and enjoyment by the grantee's descendants for a very long time. [p. 357, col. 2.]

Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it, which under the *Mithakshara* Law is created by birth, does not exist. The right to maintenance cannot, therefore, be a right which arises out of the co-parcenary interest of the property or which arises out of any community of interest acquired by birth. The right to get maintenance is not evidence of any community of interest which the members of the family acquire by birth. [p. 359, col. 1.]

A junior member of the family of the holder of an impartiable *zemindary* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship and not on account of any interest in the property. [p. 359, col. 2.]

Where the plaintiff bases his claim to maintenance on no relationship, there is no community of interest and the property is not burdened with his maintenance in the hands of a donee. [p. 359, col. 2.]

Appeals against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in Original Suit No. 19 of 1911.

Messrs. *K. Srinivasa Iyenger*, *A. Krishnasami Iyer* and *A. Suryanarayaniah*, for the Appellant in No. 141 & Respondent in No. 142.

Messrs. *S. Srinivasa Iyengar*, *P. Naranyanamurthi* and *S. V. Padmanatha Iyengar*, for the Respondent in No. 141 & Appellant in No. 142.

JUDGMENT.

SANKARAN NAIR, J.—These are appeals from the decree of the Subordinate Judge, Rajahmundry, directing the defendant, the Rajah of Pittapur, to pay to the plaintiff the sum of Rs. 46,250 for maintenance.

The *zemindary* of Pittapur is an impartible estate descending by lineal primogeniture but otherwise governed by the *Mitakshara* Law. The plaintiff's father was adopted by the late *zemindar* who died in the year 1890, having executed a testamentary instrument disposing of all his properties in favour of the defendant, who also claims to be the natural son of the testator. The late Rajah had previously entered into an agreement with the plaintiff's father in 1882, whereby he had agreed to pay him Rs. 1,500 per month and a lump sum of Rs. 6,000 a year. The Will confirmed that arrangement. On the death of the Rajah the plaintiff's father sued to recover the *zemindary*, denying that the defendant was the late Rajah's natural son, and also the validity of the Will. But the suit was finally dismissed by the Judicial Committee on the ground that the Will was valid.

The plaintiff claims maintenance from 1902, when he ceased to be maintained by his

father. It will be noticed that the plaintiff does not admit that the defendant is a natural son of the late Rajah and that himself and the defendant are members of an undivided family.

The defendant contended that the plaintiff, a junior member of a family of the holder of an impartible *zemindary*, is not entitled to any maintenance from the holder, as the *zemindary* is not joint property ; that if it is, on account of the agreement, Exhibit III, and the Will referred to and also on the ground that the plaintiff does not claim any maintenance as a member of his family, the suit must be dismissed.

The Subordinate Judge decided that the *zemindary* must be treated as joint family property and the plaintiff has got, therefore, legal rights to be maintained out of the *zemindary*. He was also of opinion that such right was independent of, and not derived through, the father.

On the second question, conceding that a Hindu father has the right to represent his descendants in obtaining a provision for himself and his posterity, the Subordinate Judge held that Exhibit III was not an arrangement which was intended to include the allowance due to the plaintiff also. He also held that even if the arrangement under Exhibit III is held to enure to the benefit of the grantee during his life-time, it was not intended to include within its scope all the descendants of the plaintiff's father even during that limited period. As to the rate of maintenance, he held that Rs. 250 per month *plus* Rs. 53 for house rent would be a "reasonable and respectable" provision, and he accordingly awarded arrears of maintenance at the rate of Rs. 3,000 per annum from August 1904 when the demand was made up to the date of suit. From this decree both parties appeal.

The learned Pleader for the Raja of Pittapur intimated that though he does not propose to argue before us that the junior member of a *Mitakshara* family is not entitled to maintenance from an impartible *zemindary* in the possession of a member of the family, in view of certain decisions of this Court he reserves his right to argue that question if this case is carried before a higher Court.

We agree with the lower Court that the arrangements made by the late Raja was not a provision made for the maintenance of the plaintiff's father and all his descendants. There is nothing to show that the grantee obtained Exhibit III as the head of his branch on behalf of himself and his decendants. There is no reference therein to the heirs or descendants of the grantee. There are no doubt cases where grants have been made making a permanent provision for the maintenance of the grantee and his descendants. See *Lakshmi Narayana Ananga* v. *Durga Madhawa Deo* (1), *Salur Zamindar* v. *Pedda Pakir Raju* (2), *Sri Raja Rau Venkata Kumara Mahipati Surya Rau* v. *Sri Raja Rau Chellayammi Garu* (3). But in all those instances either the language was unambiguous or there existed a course of conduct—that is, enjoyment by a branch for a very long time, which clearly indicated such an intention. *Prima facie*, a provision for maintenance by way of money allowance is temporary. In this case the grantee was the presumptive heir. The plaintiff was not born at that time. No intention can, therefore, be presumed to make a provision for the grantee and his descendants. This point is not seriously urged in appeal.

The *next* question is whether the arrangement and the Will bar the plaintiff's claim. Even if it is not a permanent provision, it was argued that the arrangement is intended to enure for the life-time of the plaintiff's father and that during that period the plaintiff is not entitled to claim any separate maintenance as provision was also made for him in Exhibit III. It is true that when the arrangement, was entered into between the plaintiff's father and the late Raja, in fixing the amount payable to him the fact that the plaintiff's father had also to maintain the plaintiff and his brother who had been born before the date of the arrangement, must have been taken into consideration and the amount must have been settled accordingly. But if the plaintiff is entitled to claim maintenance from the Raja, the amount would naturally vary from time to time. He would, after his marriage in 1904,

(1) 16 M. 268; 20 I. A. 9; 16 Ind. Jur. 106; 6 Sar. P. C. J. 270.
(2) 4 M. 371.
(3) 17 M. 150.

require a higher amount than in 1882, the date of the agreement.

Exhibit III, as I have already pointed out, does not describe the plaintiff's father either the managing member of his branch or as the guardian of his children then in existence. In certain cases that the father represented his branch or his sons may be presumed, but this is not one of such cases. Neither the plaintiff nor his brother are referred to in the document. It may be open to the defendant to modify the agreement, Exhibit III, if he has to pay separate maintenance to the plaintiff. But the question cannot affect the plaintiff's right. We disallow this contention.

It was *then* argued that the plaintiff is only entitled to maintenance from the joint family estate and according to the plaintiff's claim he and the defendant are not members of a joint family and he is not entitled to any maintenance out of the estate in the hands of the defendant.

Before the decision of the Judicial Committee in *Sartaj Kuari* v. *Deoraj Kuari*(4), the junior members were held entitled to maintenance on the ground that the impartible *zemindary* was a joint family estate like any other partible estate in which they had co-parcenary interest, with the single exception that it could be held only by one member of the family on account of the impartible character of the holding. Joint family property and co-parcenary property were assumed to be the same under the *Mitakshara* Law. In *Sartaj Kuari* v. *Deoraj Kuari* (4), it was held that the co-parcenary interest which is acquired by a member of a joint family by birth under the *Mitakshara* Law is so connected with the right to partition that it does not exist where there is no right to partition, and that community of interest, therefore, did not exist as partition could not be enforced. At the same time their Lordships stated, that for purposes of maintenance and succession the estate should be treated as joint family estate though there was no such interest in the property as would entitle a member to object to an alienation by the holder for the time being. Subsequent to this decision, the question has been raised in this Court very often, whether the property is not for that reason the sole property of the *zemindar* and the junior members can be said to have any interest in it, so as to entitle them to any maintenance or on their succession to the *zemindary* to deny their liability to pay the debts of their predecessor. The decisions upheld the right of the junior member to maintenance. The ground of decision was that for this purpose they must be taken to be members of a joint family. In the *Udayarpalayam* case(5), the High Court gave a decree for maintenance as the estate was found to be impartible and this decision was confirmed by the Judicial Committee, though the question whether a junior member is entitled to any maintenance does not seem to have been argued before their Lordships. In all the cases decided by this Court or the other Courts in India, in which the junior member's claim for maintenance has been upheld, the right was held to exist on the ground that he was a member of a joint family. According to the plaintiff, the plaintiff and the defendant are not members of a joint family. The plaintiff is not, it is argued, therefore, entitled to any mainterance out of the estate. It is argued, on the other side, that at the time of his birth he was the grandson of the then holder of the estate and his right to maintenance, therefore, cannot be defeated by an alienation subsequently made by that holder in favour of the defendant. Or in other words, it is urged that the sons of the plaintiff's father born subsequent to the vesting of the *zemindary* in the defendant may not be entitled to any maintenance out of the estate; if he had any interest in the *zemindary* before its alienation, then the plaintiff might be entitled to recover it. But the question is, if the plaintiff's claim was only a right to recover maintenance from the holder for the time being and his maintenance was not a charge on the estate, though it may have to be paid out of the incomes of the estate and with reference to it, whether then the plaintiff would be entitled to enforce it against the estate in the hands of an alienee who is not admitted by the plaintiff to belong to his family. Before the decision in *Sartaj Kuari* v. *Deoraj Kuari* (4) the question could not arise. We have, therefore, to consider the grounds of that decision. In that case the High Court of Allahabad

(4) 10 A. 272; 15 I. A. 51; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213.

(5) 24 M. 562; 11 M. L. J. 191.

laid down the law in the following terms:— "It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership." That is, the High Court decided that the right to maintenance was due to a kind of dormant co-ownership which is subordinated to the title of the individual member to hold the estate. This was the proposition which came before the Judicial Committee for consideration. Referring to the various cases in which an impartible *zemindary* was treated by their Lordships in their previous decisions as common family property or joint family property, the Judicial Committee said that all such statements were only made with reference to the questions then in issue, that is, the right of succession or right to maintenance and they declared the law in these words: "This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the *Mitakshara* Law is created by birth does not exist." It is quite clear that the plaintiff is not, therefore, a co-parcener. They further held that the property in the paternal or ancestral estate acquired by birth under the *Mitakshara* Law is, in their Lordships' opinion, so connected with a right to partition "*that it does not exist where there is no right to it.*" Accordingly the plaintiff has not acquired any interest by birth. The right to maintenance, therefore, cannot be a right which arises out of the co-parcenary interest in the property or which arises out of any community of interest acquired by birth.

The property is, however, joint family property in the sense of the younger brother's taking "such rights and interests in respect of maintenance and possible rights of succession as belong to a junior member of a *raj* or other impartible estate descendible to a single heir." If the impartible *zemindary* is joint family property for purposes of maintenance, is not the right of maintenance, which has been upheld by the decisions of this Court, evidence of community of interest? Their Lordships held otherwise. This appears to be clear from a reference to the Hunsapore case, *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*(6) and the *Dayabhaga* Law. Referring the case of *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (6), their Lordships said that though the estate was governed by *Mitakshara* law and had descended by family usage and custom according to the rule of primogeniture, subject to the burden of making allowances to the junior members of the family for maintenance, yet the right to get maintenance was not evidence of any community of interest which the members of the family acquired by birth. With reference to the *Dayabhaga* Law, they say: "In Bengal there is joint family property, but where property is held by the father as its head, his issue have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases, and they cannot demand a partition. The sons have not ownership while the father is alive and free from defect. Upon his death, the property in the sons arises, and with it a right to partition." (Dayabhaga, Chapter I.) This shows that in the opinion of their Lordships, property may be called *joint family property*, though the junior members may have no ownership in the same at all during the lifetime of the holder for the time being. Their Lordships also point out that the father may alienate the property. The purchaser takes it without any obligation to maintain the sons. That their Lordships use the term 'joint family property' in a peculiar sense, not in the ordinary acceptation of those words, is not a reason for disregarding their opinion. That opinion was necessary to support the conclusion therein arrived at. A junior member of the family of the holder of an impartible *zemindary* is, therefore, entitled to maintenance only as in a *Dayabhaga* family on account of his relationship, and not on account of any interest in the property. The plaintiff does not advance any claim based on relationship; he refuses to admit any relationship. His claim cannot be sustained on that ground. As there was no community of interest, the property is not burdened with his

(6) 12 M. I. A. 1; 9 W. R. 15 (P. C.); 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241.

claim in the hands of a donee. In this view the plaintiff's claim fails. We reverse the decree and dismiss the suit with costs throughout.

OLDFIELD, J.—I have had the advantage of reading my learned brother's judgment and have nothing to add to it as regards Exhibit III and the effect on plaintiff's claim of any settlement with his father. There remains the wider question, whether that claim is sustainable by him in virtue of his position as a junior member of the Pittapur family.

As set out in my learned brother's judgment, plaintiff has, for motives which are easily intelligible, refused to rely on any relationship between himself and defendant, the present *zemindar*. Defendant must, therefore, for the purpose of the case be regarded as an alienee of the estate, who acquired it after plaintiff's birth. The questions in general terms are, therefore, whether (1) a junior member of a family has a right to maintenance from an impartible estate held by its head (2), that right is acquired at birth and runs with the estate after its transfer to a stranger.

The learned Pleader for defendant reserved his right to argue the first of these questions elsewhere, if necessary, and confined himself to the second. I understand him by taking that course to have conceded provisionally that the junior member's right existed, but to have admitted nothing as to its nature or basis, which could involve its binding the estate in the hands of an alienee. Plaintiff supported his claim as founded in one way only, on the validity of a proposition which he contended for as settled law, that members of a joint family, whose property is impartible, are entitled to maintenance from that property, in whosoever hands, during their lives, because they cannot claim shares in it on division. It is not suggested that this proposition can be supported by any text. It must then be justified either as endorsed by authority or on general principles.

Firstly, as to authority there is no case dealing with a claim against an alienee. Nor in fact is there any, in which the claim against the head of a family was contested directly as founded on principle and the legal rights of junior members of the family in its property were discussed fully for this purpose. For in *Maharana Shri Fatehsangji Jasvatsangji* v. *Kuvar Harisangji* (7), though liability was disputed generally, attention appears to have been confined to the question of the special law applicable to the parties, and the general issue was dealt with shortly by reference to *Muttusawmy* v. *Venkataswara* (8), *Himmatsing* v. *Gunpatsingh* (9). In the first of these decisions the Privy Council was dealing with the case of an illegitimate son and remitted it for determination as to his right against the *zemindary* property; the High Court thereon [*Coomara Yettappa Naikar* v. *Venkateswara Yettia* (10)] treated that right as established by *Chuoturya Run Murdun Syn* v. *Sahub Purhulad Syn* (11), which simply recognised the right to maintenance of an illegitimate son; *Naragunty Lutchmeedavamah* v. *Vengama Naidoo* (12), which referred to the right only incidentally, and *Stree Raja Yanumula Venkayamah* v. *Boochia Venkondora* (13), to which further reference will be made. In the other decision referred to by the Bombay High Court, the plaintiff's claim was no doubt allowed on a ground similar to that relied on here, but without comprehensive discussion or reference to the law, as now understood. In later cases and in this Presidency the right to maintenance has either not been denied on principle, the dispute being confined to its amount, or its existence has been referred to merely incidentally to the discussion of the other characteristics of impartible estates, in particular their in alien ability. The *Udayarpalayam* case *Kachi Kaliyana Rengappa Kalakka Thola Udayar* v. *Kachi Yuva Rengappa Kalakka Thola Udayar* (14) is an instance of the former description; and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai Tirupati Devastanams* (15) of the latter; and *Baboo Beer Pertab Sahse* v. *Maharaja Rajendar Pertab Sahee* (6) of both. In these

(7) 20 B. 181.

(8) 12 M. I. A. 203; 11 W. R. 6 (P. C.); 6 B. L. R. 15 (P. C.); 2 Suth. P. C. J. 175; 2 Sar. P. C. J. 395; 20 E. R. 317

(9) 12 B. H. C. R. 94

(10) 5 M. H. C. R. 405.

(11) 7 M. I A 18; 4 W. R. 132 (P. C.); 1 Suth. P. C. J. 313; 1 Sar. P. C. J. 591; 19 E. R. 217.

(12) 9 M. I. A. 66; 1 W. R. 30 (P. C.); 1 Suth. P. C. J. 460; 1 Sar. P. C. J. 826; 19 E. R. 666.

(13) 13 M. I, A. 333; 13 W. R. (P. C.) 21; 12 Suth. P. C. J. 302; 2 Sar. P. C. J 546; 20 E. R. 576.

(14) 28 M. 508; 15 M. L. J. 312; 2 C. L. J. 231; 1 M. L. T. 12; 10 C. W. N. 95; 7 Bom. L. R. 907; 2 A. L. J. 845; 32 I. A. 261.

(15) 2 Ind. Cas. 18; 32 M. 429; 19 M. L. J. 401.

circumstances, although the proposition put forward by plaintiff may occasionally have been more or less explicitly stated, it is not possible to hold that it has been sanctioned at any time by authority. Those occasional statements of it occur, it is to be observed, only in the judgments of the High Courts, the Privy Council having never committed itself to any more explicit statement than that contained in *Stree Rajah Yanumula Venkayamah* v. *Boochia Vankondora* (13), where it is said regarding the character of an admitted grant that "these grants by way of maintenance are, in the ordinary course of what is done by a person in the enjoyment of a *raj* or impartible estate, in favour of the junior members of the family, who but for the impartibility of the estate would be co-parceners with him." This clearly involves no decision that such grants originate in any principle of law and, an important point, not in custom or even benevolence, the last sentence merely supplying an explanation for them equally consistent with any of these origins. But it is possible that Judges in this country have been led to some extent by this passage to make the more definite statements on which plaintiff relies, and to credit the law in their *obiter dicta* with a symmetry which authority has never recognized directly.

My learned brother has observed that the conception of impartible property and its incidents was altered by the decision in *Sartaj Kuari* v. *Deoraj Kuari* (4) and I may add, in this Presidency by the decision in *Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards* (16). I concur with him in his conclusion that the right to maintenance does not arise from any co-parcenary interest in the property or any community of interest acquired by birth. As plaintiff's proposition is, in my opinion, inadequately supported by authority prior to these decisions and as its correctness is negatived by them, it is unnecessary to discuss its merits at length. The contention is however in effect, *firstly*, that, because a junior member of a *Mitakshara* family cannot, when the property is impartible, derive advantage from his membership in the ordinary way he is on that account entitled to derive it in another, not ordinarily authorised by Hindu Law. It is, *next*, that he can do so by way of receipt of a maintenance, although the cases in which a right to maintenance is recognised by the texts, are those of illegitimacy or other disqualification personal to the claimant and in no way depend on the nature of the property. Both positions seem to me open to question, and I should in the absence of direct authority hesitate to adopt them

In these circumstances plaintiff, having failed to show that he acquired a right to maintenance from the impartible estate by birth, must fail. I observe that his claim has been based on his membership of a *Mitakshara* family and his consequent acquisition of a right in its impartible property, and could be dealt with only on that basis. It has not, therefore, been open to us to consider his claim as based on custom, either as regards the Pittapur estate or impartible estates in general in this Presidency, although, if it had been put forward on the latter basis, the instance of recognition of the right to maintenance afforded by the reported decisions might have been important evidence in his favour.

In the result, I concur in my learned brother's judgment, dismissing the suit with costs.

Appeal allowed.

(16) 26 I. A 83; 22 M. 383; 3 C. W. N. 415; 9 M. L. J. Sup. 1.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 1735 OF 1913.

December 22, 1914.

Present:—Mr. Justice Shah Din.

RATTAN MALIK—PETITIONER

versus

TIRATH RAM AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 15 (1), scope of—Petition presented by the debtor—Dismissal on the ground of bad faith—Material irregularity.

The concluding portion of sub-section (1) of section 15 of the Provincial Insolvency Act of 1907 refers only to cases in which the application has been made by the creditor and is opposed by the debtor. [p. 363, col. 2.]

Where, therefore, an insolvency petition presented by a debtor was dismissed under section 15 (1) of the Act, on the ground that the petitioner had been guilty of bad faith in having given undue preference to some of his creditors over others:

Held, that the District Judge acted with material irregularity in the exercise of his jurisdiction in dismissing the petition upon that ground. [p. 363, col. 2.]

RATTAN MALIK *v.* TIRATH RAM.

Girwardhari v. *Jai Narain*, 7 Ind. Cas. 39; 7 A.L.J. 835; 32 A. 645; *Udai Chand Maity* v. *Ram Kumar Khara*, 7 Ind. Cas. 394 12 C. L. J. 400; 15 C. W. N. 213, *Sheikh Samirud-din* v. *Kadar Moyee Dassi*, 7 Ind. Cas. 691; 12 C. L. J. 445; 15 C. W. N. 244, followed.

Nathu Mal v. *District Judge of Benares*, 6 Ind. Cas. 870; 7 A. L. J. 602; 32 A. 547, dissented from.

Petition for revision from an order of the Divisional Judge, Multan, dated the 28th August 1912.

Lala *Mehr Chand*, for the Petitioner.

Mr. *T. D. Khanna*, for the Respondents.

JUDGMENT.—This is a petition under section 46 (1) of Act III of 1907, for revision of the order of the Divisional Judge, Multan, confirming the order of the District Judge of Multan, whereby the insolvency petition presented by the petitioner was dismissed under section 15 (1) of the said Act on the ground that the petitioner had been guilty of bad faith in having given an undue preference to some of his creditors over others.

It is contended by the petitioner's Pleader that sub-section (1) of section 15 of the Provincial Insolvency Act under which the District Judge dismissed his client's petition is not applicable at all to the case like the present, where a debtor who has applied to be declared an insolvent has been found to have committed an act of bad faith; that the concluding portion of the said sub-section (1) authorises the dismissal of a petition made by a creditor, where the Court is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order of adjudication ought to be made against the debtor; and that, therefore, the ground upon which the petitioner's insolvency petition has been dismissed was not a valid and sufficient ground for the dismissal of the petition.

In support of this contention the learned Pleader has cited *Girwardhari* v. *Jai Narain* (1), and two decisions of the Calcutta High Court, one in the case of *Udai Chand Maity* v. *Ram Kumar Khara* (2) and the other in the case of *Sheikh Samir-ud-din* v. *Kadar Moyee Dassi* (3), respectively. In the Allahabad case Mr. Justice Chamier says at page 649: "Under section 351 of that Code (*i.e.* Code of Civil Procedure, 1882) the Court could grant an insolvency application only on being satisfied that the debtor had not transferred any part of his property with intent to defraud his creditors, and had not recklessly contracted debts or given an unfair preference to any of his creditors and had not committed any other act of bad faith regarding the matter of the application. Under the Insolvency Act, 1907, these appear to be grounds for refusing an absoluto order of discharge (see section 44), but not grounds for refusing to make an order of adjudication. The latter part of sub-section (1) of section 15 of the Act of 1907 reproduces almost word for word section 7, sub-section (3), of the English Bankruptcy Act of 1883, which plainly refers to an insolvency petition presented by a creditor.

"In my opinion the latter part of sub-section (1) of section 15 of the Indian Act has no reference to an insolvency petition presented by a debtor. Authority for dismissing a debtor's petition for 'any sufficient cause' must be found, if at all, elsewhere."

In the present case the District Judge has followed the ruling of the Allahabad High Court in *Nathu Mal* v. *District Judge of Benares* (4). The learned Judges in the course of their judgment in that case said: "We wish to clearly express our opinion that the learned Judge (in the Court below).....was clearly wrong in granting the petition of Nathu Mal and declaring him insolvent. Section 15 of Act III of 1907 provides, amongst other things, that if the Court is of opinion for any sufficient reason that the order of adjudication should not be made, the Court should dismiss the petition." Mr. Justice Chamier in the later case cited above does not accept the construction put upon section 15 (1) in *Nathu Mal* v. *District Judge of Benares* (4), because, in his opinion, the latter part of sub-section (1) of section 15 only relates to an insolvency petition presented by a creditor and has no reference whatever to a petition presented by a debtor.

The same view has been taken by two Division Benches of the Calcutta High Court

(1) 7 Ind. Cas. 39; 32 A. 645; 7 A. L. J. 835.
(2) 7 Ind. Cas. 394; 12 C. L. J. 400; 15 C.W N. 213.
(3) 7 Ind. Cas. 691; 12 C. L. J. 445; 15 C. W. N. 244.
(4) 6 Ind. Cas. 870; 32 A. 547; 7 A. L. J. 602.

in the cases cited above. In *Udai Chand Maity* v. *Ram Kumar Khara* (2), Mr. Justice Mookerjee says: "It is clear, therefore, that there was ample proof of the right of the appellant to present the petition.

"The question now arises whether there was any valid ground for the dismissal of this application. The learned Judge has proceeded on the ground that the conduct of the petitioner has not been satisfactory and that he has made a false statement in his application, inasmuch as he mentions the name of a certain person as creditor in whose favour he had created a fictitious debt.

"It is obvious, however, from sub-section (1) of section 15 that those are not circumstances which can be taken into account by the Court at this stage to determine whether the application should be granted or refused.

"Reliance has been placed by the learned Vakil for the respondent upon the concluding words of sub-section (1) of section 15, which lay down the rule that where the Court is satisfied by the debtor that he is able to pay his debts or that for any other sufficient cause no order ought to be made, the Court shall dismiss the petition. But it is clear that this portion of sub-section (1) of section 15 refers only to cases in which the application has been made by the creditor and is opposed by the debtor. In such a contingency, if the debtor can satisfy the Court that he is able to pay his debts or that for any other sufficient cause [such as those mentioned in *Ex parte Dixon*, *In re Dixon* (5) and *Ex parte Oram*, *In re Watson* (6)] no order ought to be made, it is the duty of the Court to dismiss the application."

In the case of *Sheikh Samir-ud-din* v. *Kadar Moyee Dassi* (3), the same learned Judge observes as follows:—

"In the case before us, the learned District Judge has dismissed the application on a ground which is not included in any of those mentioned under section 15, sub-section (1). He has proceeded on the ground that as the debtor has, in his opinion, committed an act of bad faith, he is not entitled to an order of adjudication.

"This is clearly erroneous. The question of bad faith or improper dealing with the property of an insolvent arises for consideration at a much later stage of the proceedings. If the debtor, after the order of adjudication, applies for an order of discharge, it becomes obligatory upon the Court, under section 44 of the Provincial Insolvency Act, to investigate whether or not he has been guilty of acts of bad faith. Sub-section (3) of section 44 provides that the Court shall refuse to grant an absolute order of discharge on proof of various facts, which may be described compendiously as acts of fraud and bad faith."

My own view coincides exactly with the opinion expressed by the learned Judges of the Allahabad and Calcutta High Courts in the cases just cited: and, following the decisions in those cases, I hold that the District Judge acted with material irregularity in the exercise of his jurisdiction in dismissing the petitioner's insolvency petition upon the ground mentioned in his order.

I accordingly accept this revision and, setting aside the orders of the Divisional Judge and the District Judge, send the case back for disposal according to law. I make no order as to costs.

Revision accepted.

(5) (1889) 13 Q. B. D. 118; 10 L. T. 414; 50 L. J. Ch. 769; 32 W. R. 837; 1 Morrell 98.

(6) (1885) 15 Q. B. D. 399; 52 L. T. 785; 33 W. R. 890; 2 Morrell, 199.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 554 OF 1914.

April 21, 1915.

Present:—Justice Sir P. C. Banerji, KT.

MATHRA PERSHAD AND ANOTHER—DEFENDANTS—APPELLANTS

versus

CHEDDI LAL—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 68, 72—Mortgage-bond not properly attested, if admissible in evidence—Simple money-bond.

Where a mortgage-deed is not properly attested in accordance with the provisions of section 59 of the Transfer of Property Act, it is not admissible in evidence as a mortgage-deed but it is admissible in evidence as a simple money-bond [p. 364, col. 2.]

Pulaka Veetil Muthalakulangara Kunhu Moidu v. *Thiruthipalli Madhava Menon*, 1 Ind. Cas. 1; 32 M. 410; 19 M. L. J. 584; *Tofaluddi Peada* v. *Mahar Ali Shaha*, 26 C. 78; *Veerappa Kavundan* v. *Ramasami Kavundan*, 30 M. 251; 17 M. L. J. 213, followed.

Collector of Mirzapur v. *Bhagwan Prashad*, 18 Ind. Cas. 311; 11 A. L. J. 141; 35 A. 164, distinguished.

Second appeal from the decision of the District Judge of Allahabad, dated the 2nd April 1914.

Mr. *Umashankar Bajpai*, for the Appellant.

Mr. *G. L. Agarwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent to realise the amount of a bond, dated the 23rd of August 1910, alleged to have been executed by one Ramdhan Lal in favour of the plaintiff and his deceased father, Ramadhin. Ramdhan Lal is dead. The suit was brought against the appellants who are in possession of Ramdhan Lal's property under a Will. The bond on the face of it purported to be a mortgage bond and the suit was brought in the Court of first instance to enforce the mortgage. That Court was of opinion that the document had not been duly attested as required by section 59 of the Transfer of Property Act and could not be treated as a mortgage. For that reason alone the Court dismissed the suit. The plaintiff appealed and in the Appellate Court he abandoned the claim for sale of the mortgaged property and asked for a simple money decree in respect of the debt. The learned Judge found that the document had been duly executed by Ramdhan Lal and that he had received the amount of it which was paid in the presence of the Sub-Registrar. He made a money-decree in favour of the plaintiff, to be recovered from the assets of Ramdhan Lal in possession of the defendants-appellants. This appeal has been preferred by the defendants and the only contention on their behalf is that in view of the provisions of section 68 of the Evidence Act the bond was not admissible in evidence for any purpose. I am unable to agree with this contention. As a mortgage it was undoubtedly necessary that the document should be attested by at least two witnesses and that one of those witnesses should be called. But it appears from the evidence of the scribe and of the witness Mata Ghulam that the document in question was not attested at all. On the contrary the scribe proved that Ramdhan Lal signed the document at the house of the scribe where it was written, and took it to the witnesses afterwards and got their signatures on it after admitting execution. This evidence of the scribe shows that the document was not attested in accordance with the provisions of section 59 of the Transfer of Property Act. Therefore it could not be treated as a mortgage. It is only in the case of a document which required to be attested and was attested that under section 68 of the Evidence Act it was necessary to call an attesting witness, as the document in this case was not so attested, section 68 had no application, and the case, in my opinion, fell within the purview of section 72 of the Evidence Act. For a simple money bond it is not necessary that it should be attested by witnesses. As the bond in this case was not so attested it was a valid document as a simple money bond and was admissible in evidence. This was held by a Full Bench of the Madras High Court in the case of *Pulaka Veetil Muthalakulangara Kunhu Moidu* v. *Thiruthipalli Madava Menon* (1) and by the Calcutta High Court in *Tofoluddi Peada* v. *Mahar Ali Shaha* (2). The case of *Veerappa Kavundan* v. *Ramasami Kavundan* (3), has, under the circumstances mentioned above, no application to the present case and it is unnecessary for me to say whether I agree with the decision in that case. There can be no doubt that the bond in this case contained a personal covenant and the plaintiff is entitled to a money decree in enforcement of that covenant. The learned Vakil for the appellant has referred to the Full Bench ruling of this Court in *Collector of Mirzapur* v. *Bhagwan Prashad* (4), but that case has apparently no bearing on the case before me. The terms of the document in that case were peculiar and it was held that under those terms there could not be a personal decree against the executant of the document. The appeal is, in my opinion, without force. I dismiss it with costs including fees on the higher scale.

Appeal dismissed.

(1) 1 Ind. Cas. 1; 32 M. 410; 13 M. L. J. 584.
(2) 26 C. 78.
(3) 30 M. 251; 17 M. L. J. 213; 2 M. L. T. 175.
(4) 18 Ind. Cas. 31'; 35 A. 164; 11 A. L. J. 141.

MAHARAJA OF JEYPORE *v.* RUKMINI PATTAMHADEVI.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 50 OF 1911.

February 18, 1915.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Oldfield.

Sri Sri Sri VIKRAMADEO MAHARAJ-LUNGARU, MAHARAJA OF JEYPORE—PLAINTIFF—APPELLANT

versus

KISHETRAVARA TODRAMAL NARENDRA TATRAJ BAHADUR GARU, HAVING DIED, HIS WIFE AND LEGAL HEIR *Sri* RUKMINI PATTAMAHADEVI GARU —DEFENDANT—RESPONDENT.

Landlord and tenant—Forcible dispossession—Subsequent re-entry by tenant—Effect of dispossession on tenant's estate—Madras Reguaiton XXV of 1802, *s.* 4—*'Small quit-rent', meaning of—Permanent Settlement*—Sanad, *construction of—Lessor and lessee—Forfeiture, if incurred by lessee describing his holding as independent and permanent at a fixed rent– Resumption, when permissible—Service, whether includes attendance on ceremonial and indefinite occasions.*

Where a *zemindar* wages war against his feudatory and forcibly seizes his estate, but, later on a descendant of the said feudatory gets back possession of the same, the intermediate possession of the *zemindar* does not affect the right of the feudatory and change the character of the tenure. [p. 373, col. 2.]

Vizianagaram Maharaja v. *Suryanarayana*, 9 M. 307; 13 I. A. 32; 4 Sar. P. C. J. 696; 10 Ind. Jur. 193; *Sita Ram Vasudev* v. *Khanderav Balkrishna*, 1 B. 286; *Gunga Gobind Mundul* v. *Collector of the Twenty-four Pergunnahs*, 11 M. I. A. 345; 7 W. R. 21 (P. C.); 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 284; 20 E. R. 131 and *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*, 9 B. 198 at p. 226, distinguished.

Secretary of State v. *Vira Rayan*, 9 M. 175 at p. 185 and *Fatimatulnissa Begum* v. *Sundar Das*, 27 C. 1004, 27 I. A. 103; 4 C. W. N. 565, followed.

Where a *sanad* which was granted to a *zemindar* at the time of the Permanent Settlement contained the following clause: "Alienated lands, paying a small quit rent, which quit rent, unchangeable by you, is included in the assets of your *zemindari*"; and where it was contended that under the above clause the *zemindar* was not entitled to enhance the rent of under-tenures granted by the *zemindar* prior to the said Permanent Settlement:

Held, that the words 'small quit-rent' in the above clause, which corresponded to section 4 of the Madras Regulation XXV of 1802, meant a favourable rent; that only permanent grants should be understood as coming within the mischief of the word 'alienated' therein; that there was no warrant in authority or practice for applying it to mere temporary leases, not understood by parties to be permanent, however long their currency might be; and that the clause in question prohibited only enhancements imposed by the *zemindar* and not those to which the lessee consented. [p. 376, cols. 1 & 2.]

A lessee does not repudiate the title of his land lord and incur forfeiture by describing his holding as independent and permanent at a fixed rent. [p. 376, col. 2.]

Kali Kishen Tagore v. *Golam Ali*, 13 C. 3; *Kali Krishna Tagore* v. *Golam Ally*, 13 C. 248; and *Unhamma Devi* v. *Vaikunta Hegde*, 17 M. 218; 3 M. L. J. 287, followed.

Raja Venkatarangayya v. *Poranki Appalarazu*, 8 Ind. Cas. 546; 8 M. L. T. 429; 20 M. L. J. 728 and *Sri Rajah Parthasarathy Appa Rao* v. *Secretary of State*, 21 Ind. Cas 871; (1913) M. W. N. 959; 14 M. L. T. 514; 26 M. L. J. 39, distinguished.

Forbes v. *Meer Mahomed Tuquee*, 14 W. R. 28 (P. C.): 5 B. L. R. 529; 13 M. I. A. 438 2 Suth. P. C. J. 358; 2 Sar. P. C. J. 588; 20 E. R. 614 and *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur*, 29 M. 52 (P. C.); 16 M. L. J. 1; 1 M. L. T. 3; 3 C. L. J. 1; 3 A. L. J. 55; 8 Bom. L. R. 1; 10 C. W. N. 161; 33 I. A. 46, referred to.

A resumption of an estate is permitted to a *zemindar* only when the estate has been included in the assets of his *zemindari* at the Permanent Settlement and the grant is for service in lieu of wages (in which case the right of resumption is absolute), or is burdened with service (in which case the right can be exercised only if the grantee is unwilling to perform the service, even though the same might be obsolete or unnecessary). [p 377, col. 1.]

Where the obligations on the part of a tenant, the non-performance of which was alleged to give rise to the exercise of the right of resumption by the *zemindar*, were to attend (1) with 500 *paiks* at Dusserah, the occasion of the annual festival and Durbar and (2) whenever such attendance was directed, when the tenant went on Sircar business:

Held, that the attendance required was on indefinite and ceremonial occasions and could not be deemed a condition of the holding, that it was at the most analogous to that of copy-holders in England to do suit in the Court of their manor and that the default in question did not entail a forfeiture of the holding. [p. 378, col. 2; 379, col. 1.]

No forfeiture is incurred unless there is non-performance on the part of the tenant of a subsisting obligation for service and that service is connected with his title. [p. 379, col. 1.]

Appeal against the decree of the Court of the Agent to the Governor at Vizagapatam, in Original Suit No. 2 of 1909.

FACTS.—The facts of the case are fully set out in the judgment.

Messrs. *B. N. Sarma* and *S. Srinivasa Iyengar*, for the Appellant:—[After referring to facts]. The resumption put an end to the previous tenure. See *Vizianagaram Maharaja* v. *Suryanarayana* (1), *Sita Ram Vasudev* v. *Khanderav Balkrishna* (2), *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande* (3) and *Gunga Gobind Mundul* v. *Collector of The Twenty-four Pergunnahs* (4). Originals of Exhibit HHH series are admissible in evidence and do

(1) 9 M. 307; 13 I. A. 32; 4 Sar. P. C. J. 696; 10 Ind. Jur. 193.

(2) 1 B. 286.

(3) 9 B. 198 at p. 226.

(4) 11 M. I. A. 345; 7 W. R. 21 (P. C.); 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 284; 20 E R. 131.

not require any stamp, as the Stamp Act was never extended to Vizagaptam Agency. See *Marine Investment Co.* v. *Haviside* (5). Exhibit VI is a concoction and cannot be admitted in evidence as it does not come from proper custody.

The *zemindar* was within his rights in enhancing the rent. Exhibit K shows that the enhancement was gradual and kept pace with the reclamation of the country. Further, in this case, the enhancement was with the consent of the Thatraz and there is nothing in the Regulation XXV of 1802 to prohibit such a course. It is also competent to the *zemindar* to resume the estate, as it was a service tenure. The tenure-holder had forfeited the estate by disclaiming the title of his landlord. [See *Raja Venkatarangayya* v. *Poranki Appalarazu* (6) and *Sri Raja Parthasarathy Appa Rao* v. *Secretary of State* (7)], and also by declining to do the services which he was bound to render. See Exhibit BB.

Messrs. *K. Srinivasa Iyengar*, *V. Ramesam* and *A. Krishnaswami Iyer*, for the Respondent:—Bissemkatak was not included in the assets of Jeypore at the Permanent Settlement. See Exhibits VI, VII (*a*), VIII, IX, etc. The resumption before 1816 did not affect the previous relationship of the parties. At the most there was only a dispossession and re-instatement. See *Secretary of State* v. *Vira Rayan* (8). Exhibit HHHI is inadmissible in evidence as its original was not stamped. The Maharaja was not entitled to enhance the rent, *vide* clause (4) of the *sanad* and Exhibit D. Compare also sections 4 and 12 of Regulation XXV of 1802. The *zemindar* could not resume the estate. Default in payment of rent could be relieved against. The mere assertion of a person that his holding is independent and permanent at a fixed rent does not amount to a repudiation of the landlord's title so as to give rise to forfeiture. *Kali Kishen Tagore* v. *Golam Ali* (9), *Kali Krishna Tagore* v. *Gulam Ally* (10), and *Unhamma Devi* v. *Vaikunta Hegde* (11). cases of *Raja Venkatarangayya* v. *Poranki Appalarazu* (6) and *Parthasarathy Appa Rao* v. *Secretary of State* (7) are distinguishable as they are cases of resumption by the Government where such broad questions as the ones in issue in the present suit are not involved. Vide *Forbes* v. *Meer Mahomed Tuquee* (12), and *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadari Appa Rao Bahadur* (13). Again, the tenure in suit is not a grant subject to service. In the first place one of the services required, *viz.*, attendance whenever the Thatraz went on *sircar* business, is indefinite and unenforceable. The attendance at the procession has not been proved. Attendance at the Dusserah is only a mark of courtesy akin to that of a copy-holder in England to do suit in the court of the manor. Attendance on ceremonial occasions cannot amount to a condition of the holding, so as to subject it to forfeiture for non-performance thereof.

JUDGMENT.

OLDFIELD, J.—This appeal relates to the claim of the Maharajah of Jeypore to eject the the defendant, Thatraz of Bissemkatak, from that estate and to recover from him arrears of *kattubadi* and profits on the grounds that he has denied his liability to pay Rs. 15,000 annually and to render service and has defaulted in both respects in each year from October 1903, such payment and service being the tenure on which the estate is held. Defendant's contentions are that (1) he holds at a fixed *jama* of Rs. 2,200 only, (2) that the income of his estate was excluded from the assets of Jeypore for the purpose of the Permanent Settlement and that, therefore, his *jama* is not liable to enhancement, or his estate to resumption, and (3) he is bound to no service.

We refer to the Thatraz as defendant, though he died pending the suit, and his widow was impleaded in his place.

The Jeypore Maharajah owns a large *zemindary* of over 12,900 square miles extent,

(5) 5 H. L. 624; 42 L. J. Ch. 173.
(6) 8 Ind. Cas. 546; 8 M. L. T. 429; 20 M. L. J. 728.
(7) 21 Ind. Cas. 871; 26 M. L. J. 39; (1913) M. W. N. 959; 14 M. L. T. 514.
(8) 9 M. 175 at p. 185.
(9) 13 C. 3.
(10) 13 C. 248.
(11) 17 M. 218; 3 M. L. J. 287.
(12) 13 M. I. A. 438; 14 W. R. 28 (P. C.); 5 B. L. R. 529; 2 Suth. P. C. J. 358; 2Sar. P. C. J. 588; 20 E. R. 614.
(13) 29 M. 52 (P. C.); 16 M. L. J. 1; 1 M. L. T. 3; 3 C. L. J. 1; 3 A. L. J. 55; 8 Bom. L. R. 1; 10 C. W. N. 161; 33 I. A. 46.

situated in the hill tracts of the Vizagapatam District, of which the Bissemkatak estate, measuring approximately 500 square miles, forms part. Those tracts came under the British Government at the Permanent Settlement in 1802. But for many years they were without local Courts, Magistracy or Police, being until 1839 under the Courts on the plains. By Act XXIV of 1839 they were placed for all purposes under the Agent to the Governor and were subject to the law, as represented by rules framed thereunder. Before 1863, however, there were, in fact, neither British Magistracy nor Police in Jeypore territory. During the greater part of the period from 1869, with which we are concerned, the country was, as the District Gazetteer shows, intermittently in a state of private war between Jeypore and its neighbour, Vizianagaram, or its feudatories, including defendant's predecessors. In these circumstances, the origin and development of titles would naturally be obscure and the evidence regarding them meagre and ambiguous. It is not, however, on that account permissible to treat the burden of proof, as it devolves on either party, as discharged, until a reasonable degree of certitude has been reached, or to refuse, to the prejudice of the one, to draw inferences from substantial defects in the evidence of the other.

The case for plaintiff is that Bissemkatak was settled and has always been treated as part of Jeypore, that early in the last century it was granted to one Ramachandra, great-great-grand-father of defendant, with the designation of Thatraz (lord of the army), in remuneration for and for the continuance of his services, that it was resumed by Jeypore in 1816 and retained under direct management till after 1846, that Narandra, grand-son of Ramachandra, having obtained possession by intriguing with the then Maharajah's son, accepted a lease on an obligation for service in respect of the provision of 700 *paiks* (men at arms) and for payment of Rs. 2,500 per annum, and that this payment was enhanced to Rs. 5,000 in 1864 and Rs. 15,000 in 1877, the number of *paiks* being then reduced to 500. During the minority of plaintiff and defendant, the Agent to the Governor in charge of their estates commuted the service temporarily for an annual payment of Rs. 1,500. In 1903, defendant, on attaining majority, refused to render the service and offered to pay only Rs. 2,200, repudiating further obligation by a letter, Exhibit BB, dated 26th November 1904.

It is not disputed that plaintiff must prove his right to resume, or that he can, in no circumstances, resume lands not included in the assets on which his *zemindari* was permanently settled. The first important question is, therefore, whether the Bissemkatak estate was among those assets. Defendant has attempted to meet plaintiff's evidence that it was so (1) directly and (2) by proof that the estate became his before the Permanent Settlement under a grant, Exhibit VI, dated 1689. In connection with the alleged history of this grant reference will be made to facts which bear also on the decision of the other questions before us, whether the claim to rent at a higher rate than Exhibit VI authorises is sustainable and whether the estate, having been included in the Settlement assets, fulfils the further conditions, entailing liability to resumption, which authority prescribes.

The evidence regarding the Permanent Settlement begins with the Circuit Committee's reports, Exhibits NN and NNI. The lower Court in its paragraph No. 33 refused to attach importance to these accounts: and it may have been justified in doing so as regards matters of detail, as distinct from the principles followed. And the fact that they purport to bring the whole income of Bissemkatak into Settlement and make no reference to the restriction of Jeypore's receipts from it to the tribute of Rs. 2,200, for which defendant contends, is not without weight. No such objection, moreover, can be made to the next documents, Exhibits A and B, the *cowle* granted to Jeypore in 1795, and the *sanad*, which replaced it, dated 1803 but apparently delivered later. In them and the correspondence connected with the former, there is no sort of distinction made between Bissemkatak and the other divisions of the *zemindari*, which (it is not disputed) were included with their full incomes in the assets. The *sanad* embodied the Permanent Settement. To the probability

that the then Thatraz would have failed to plead Exhibit VI at it and obtain recognition of his independent status, we shall return. At present the point is that, all allowance made for the remoteness of these hill tracts and the lack of information available regarding them, those responsible in 1803, the Collector, the Special Committee and Govenment, are not likely to have excluded from Settlement the greater part of the income of a substantial estate, which they mentioned and of the circumstances of which they had some information (*vide* Exhibits VIII and IX), without being conscious of and referring to having done so. No doubt, as the lower Court observes, and Exhibits A1 and A8 show, the *peishkush* payable to Government was fixed arbitrarily and without direct reference to the income which Jeypore would receive. But it does not follow, and there is no general or special reason to be founded on the interest of either Government or the *zemindars* concerned, for supposing that the Settlement was, or was intended to be, incomplete or other than comprehensive of all assests in the settled tracts. Defendant does not suggest that any part of the income of his estate, other than that represented by his liability to Jeypore, was settled separately. The documents referred to are, in our opinion, sufficient to transfer the burden of proof from plaintiff on this point.

Defendant relies to discharge it, *first*, on the correspondence preliminary to the issue of Exhibit D, relating to the abolition of *sayer* or customs revenue in the tracts under Settlement. In Exhibit VIII, in 1802, Mr. Webb, the Collector, referred to Bissemkatak as held on a hereditary tenure by a proprietor, with whom it would be necessary to negotiate through Jeypore for the closure of a *chowky* or custom-house on its borders; and in Ehhibit IX, 1803, his successor, Mr. Alexander, described it as "not immediately under the management of Jeypore, but constituting a small separate *zemindari* held by the Thatraz." It does not, however, follow that the possession of a *chowky* by Bissemkatak involved its independence. For, it is clear from Exhibit VII that it was accountable for the *sayer* collected by it to Jeypore; and the meaning may well be that a revision of the agreement between it and Jeypore as to the collection would have to be arranged. Mr. Alexander had been Secretary to the Circuit Committee (Exhibit A3). But his experience as Collector had been short when Exhibit IX was written: and nothing therein entails his meaning that Bissemkatak was subject to a fixed tribute, or had independent assets over which Jeypore had no claim. If he, or Mr. Webb, had meant that, they must have gone on to do what no record suggests their contemplating and what was never done, settle with Bissemkatak on those assets independently. And in fact these letters strongly support plaintiff's case that the omission to make such a Settlement was intentional and was due to the fact that the Settlement with Jeypore was known to be comprehensive.

Further argument for a different intention has been based on the details of the account alleged to have been submitted with Exhibt IX, Exhibit B and VII series, when the Jeypore *peishkush*, fixed by Lord Hobart at Rs. 25,000, was reduced to Rs. 16,000 in consequence of the abolition of the *sayer*. In Exhibit IX, an attempt was made for the first time to deal with the actual income of the *zemindari*, Mr. Alexander estimating the hardship involved in the loss of the *sayer* revenue with reference to the actual income which Jeypore would receive after it, and arriving at that actual income by substituting for the income shown in Exhibit N, N1 from Bissemkatak and Gunupore *pergunnahs*, the only parts of the *zemindari* not under direct management, the actual fixed income therefrom, Rs. 3,344 in the case of the former, thus excluding the farmer's profit. And defendant, therefore, argued that, in Mr. Alexander's opinion, only that actual income had been included in the assets on which the Settlement was made. Again, having thus estimated the Jeypore income, he reached his conclusion as to the effect of the abolition of the *sayer* by deducting from it the total *sayer* for the *zemindari* shown in Exhibit V11b, less that derived from Bissemkatak and Gunupore; and this also, it is said, involves that they were treated by him as independent estates, with which separate Settlement would be necessary.

One answer to the first of these arguments

is that materials for it are not available, since it depends on the allegation that fixed income from Bissemkatak was Rs. 3,344; and that rests only on Mr. Alexander's statement in Exhibit IX, which is, as will appear, of questionable value, and on Exhibit VII*a*. This fixed income is material in connection also with defendant's argument in support of Exhibit VI, and it is, therefore, necessary to deal with Exhibit VII*a* closely. It is an unsigned account and is not referred to explicitly as an enclosure to Exhibit IX or elsewhere in the correspondence; and, though objection was taken to its admission in the lower Court, there is nothing regarding its history or origin. It accordingly differs from Exhibit VII which has in its favour the fact that the figures in it are repeated in, and were presumably the basis of, Exhibit B1, the enclosure to the report of the Board of Revenue to Government, Exhibit B. Both accounts, as their headings show, purport to have been furnished by the *lopayikari*, or subordinate *zemindar*. Samburaju. He may be identical with the Somanatha referred to at page 233, District Gazetteer. But, if so, his description of himself as *lopayikari*, not as Thatraz, is peculiar. Mr. Alexander, no doubt, in Exhibit IX referred only to the Thatraz, but the extent of his appreciation of the facts is doubtful. In the circumstances, plaintiff's explanation that the person in question, whether Somanath or some temporary renter, Samburaj, claimed no independent status, calls for consideration in this connection and in another to be referred to later. The heading of Exhibit VII*a* describes it as the *kham irusalnama* of Bissemkatak that is the gross remittance account, as *kham bhogatta* in the heading of Exhibit VII means gross demand account (*Vide* Wilson's Glossary). But the explanation for the differences between the figures in the two accounts for the same years, that Exhibit VII shows gross collections and remittances to the Bissemkatak Estate Treasury and Exhibit VII*a* the net remittances by Bissemkatak to Jeypore, is inconsistent with that interpretation of the former term. No explanation, moreover, has been offered for the reference to remissions in Exhibit VII*a*, in one year as much as Rs. 550, which are inconsistent with the theory that the Rs. 3,344, the figure on which defendant relies, was a fixed payment for land revenue and *sayer*. In these circumstances, we cannot act on Exhibit VII*a* as authentic, and the reference to Rs. 3,344, in Exhibit IX alone, is then insufficient ground for a conclusion.

For, to deal with the second objection to defendant's argument, scrutiny of Exhibit IX makes it doubtful whether Mr. Alexander wrote with any clear understanding of the facts; and the diposal of the matter by the Board of Revenue and Government did not consist in any adoption of his proposals, or involve anything which can be regarded as security for the correctness of his statements. As regards the first point, in paragraph No. 7 of Exhibit IX, Mr. Alexander wrote as though the terms of the *sanad* to be granted were still open to discussion and referred to his attempts to obtain accounts in order to an estimate of the Jeypore and other *zemindaris*, as though accounts, to which he made no reference, had not already been obtained by the Circuit Committee. Yet, having obtained Exhibit VII and (in some way) the figure, Rs. 3,344, he made no attempt to propose a revised *peishkush* on the fresh facts available, but adopted that of Rs. 25,000 already fixed, as beyond controversy. Next, in his calculation, he overlooked the fact that the fixed payment of Rs. 3,344, retained by him in the Jeypore income, in fact included Rs. 1,115 on account of the *sayer*, then under abolition, which should have been excluded, if the calculation was to be correct; and he did so, although, if defendant's contention is valid, he had Exhibit VII series before him, in which the fixed payment for *sayer* is distinctly referred to. Lastly, he referred to Exhibit A, Lord Hobart's *cowle*, as promising a deduction from the *peishkush* in consideration of the abolition of *sayer*, though it expressly negatived the right to one; and the explanation offered, that the reference is really to an annual *cowle* in some year subsequent to 1794, is useless, since the issue of such a *cowle* rests only on defendant's own statement in Exhibit YY6 in 1904. When these objections to Exhibit IX are unrebutted, it is not possible to assume the competence of its author, or the accuracy of his other statements, including those relating to the fixed annual payment, or the independent *sayer* of Bissemkatak and Gunupore. And next,

the lower Court erred in its statement that Mr. Alexander's proposals were adopted by higher authorities. He, first, in Exhibit IX, estimated the hardship to Jeypore, which the loss of the *sayer* would entail, and then proposed that a proportionate deduction from *peishkush* should be made. But the Board of Revenue, on whose report, Exhibit B, Government acted did not follow him in either of these directions. For, it proposed no proportionate deduction from *peishkush*, but a deduction of Rs. 9,000, pretty evidently a round figure for Rs. 9,223, Mr. Alexander's estimate of actual collection for *sayer*; and, if it did follow him in adopting the latter figure and excluding the Bissemkatak and Gunupore *sayer* from it, it is probable that it did so from inadvertence, since its reference to the Collector's estimate is general and includes no mention of these two estates, or the necessity for a separate Settlement with them. Exhibit B in fact contains nothing, which entails or suggests that the portion of Mr. Alexander's report on which defendant relies, was or need have been treated as material in order to the disposal of the matter; and there is, therefore, no sufficient security for the correctness of his statements. The direct objection to plaintiff's case based on Exhibits VII and IX series must, therefore, be disallowed.

We turn *next* to defendant's claim that he holds the estate under a grant, Exhibit VI, dated 1689, his sole obligation being a payment of Rs. 2,200 per annum. The burden of proof of this grant is on him. Exhibit VI, the authenticity of which he must establish, is an inscribed copper plate; and we have not been shown that there is any intrinsic probability against its fabrication at a date later than that which it bears. Direct evidence of its origin is not to be expected, and defendant, therefore, relies on section 90 of the Indian Evidence Act, that is on evidence of its production from proper custody in circumstances justifying the making of the presumption authorised by that provision. The custody of Exhibit VI was, it is certain, with Government from 1891, when it was given by defendant's witness No. 11 to the Special Assistant Agent, then in immediate charge under the Agent of Bissemkatak estate during defendant's minority, until it was restored to him after he attained majority in 1903. That custody, no doubt, might be held proper. But it is the only established fact in this part of the case; and we are not prepared to draw the necessary presumption with reference to it alone. We, therefore, deal with the circumstances in which the custody by Government is alleged to have originated.

They begin with the fact that in 1853 disputes between the predecessors of the parties as to the tenure of Bissemkatak reached a climax, and the Agent summoned them in order to a settlement. The then Thatraz, instead of appearing, sent the petition, Exhibit X, in which he complained of the aggressions of one of the Maharajah's subordinates, stated his own case and enclosed what is now alleged to have been a translation of Exhibit VI. On account of the absence of both parties no settlement was effected, the Agent merely recording his opinion that an attempt should be made to fix a proper sum as rent or *kattubadi* for Bissemkatak. It is now, however, alleged that Exhibit VI was actually produced before the Agent by a representative of the Thatraz for the purpose of the enquiry, who retained it after taking it back owing to a quarrel over his master's failure to give him land as remuneration for his services. That representative is said to have been Narayana Patnaik, father of Karunakar Patnaik, an estate employee, now deceased. 12th defendant's witness's evidence is that he received Exhibit VI and three account books from Karunakra for safe custody, when the latter anticipated a search of his house by the Special Assistant Agent, Mr. Elwin, in connection with a charge of malversation, but handed them over to defendant's witness No. 3, defendant's mother, who sent them by her brother, defendant's witness No. 12, to Mr. Elwin whilst he was at Bissemkatak.

This case teems with improbabilities and inconsistencies. It was first put forward in any detail in paragraph 17 of Exhibit YY6, a representation made by defendant to Government in 1904, and based according to defendant's witness No. 13, who prepared it, on information obtained from defendant's witness No. 3. But the story, as told in Exhibit YY6, differs from that supported by Exhibit X series and that which defendant's witness No. 3 gave in evidence on the authority of her mother-

in-law. For, Exhibit YY6, refers to the document as actually produced before and taken back from the Agent; the order on Exhibit X, Exhibit Xb, implies that there was no inquiry at which evidence can be supposed to have been adduced; and defendant's witness No. 3 understood that Narayana Patnaik secreted Exhibit VI and did not produce it before the Agent at all. Next the identity of the agent employed by the Thatraz is uncertain. For the signatory of Exhibit X on his behalf was Narain Doss, and he cannot have been the same as Narain Patnaik, Doss being a Brahmin and Patnaik, a Sudra description. Again Exhibit QQQ shows that Narain Patnaik did receive land, service *inam* No. 10, from the Thatraz, and that Karunakara held it after him; and though this does not preclude his having quarrelled with his employer on the ground that the grant was insufficient, it and his and Karunakara's retention in service make it highly improbable that they were wrongfully retaining an essential estate record, which the Thatraz would naturally be eager to recover. Lastly, the details of the story as to the recovery of Exhibit VI before its surrender to Mr. Elwin are insufficiently supported. He, no doubt, has probably forgotten and could have given no evidence as to what he was told; and the letter sent by defendant's witness No. 3 with Exhibit VI has no doubt been destroyed. But of the three witnesses concerned, defendant's witnesses Nos. 3 and 11 are defendant's close relatives and defendant's witness No. 12 his low paid servant. The story is not probable. For Karunakara could have found many better ways of secreting Exhibit VI than depositing it with an untrustworthy person such as the last mentioned: and it will be shown later that the conduct of defendant's witnesses Nos. 3 and 11, of whom the former professes full knowledge of the importance of the document, was improbable in respect of their failure to rely on it.

The direct evidence in support of Exhibit VI standing thus, it might be unnecessary to deal with the plaintiff's argument to rebut it. One branch of that argument, his attack on the document on intrinsic grounds, has been considered fully by the lower Court, and we can concur on its rejection of it, because *data* for it are wanting. For it depends on the allegation that a different method of inscribing copper plates was in vogue in Jeypore in 1689 and on discrepancies between the terms of Exhibit VI and historical facts, or statements in Exhibit RRR, a communication by plaintiff to Government; and the allegation and facts are not, in our opinion, adequately established, whilst the statements are in no way binding on the plaintiff in this suit and may easily have been mistaken. The other branch of the argument, however, includes references to past occasions, on which it is alleged that Exhibit VI was, or, if it had really been in the Thatraz's knowledge or possession, should have been, relied on; and they would, in any case, have called for mention in connection with the nature of defendant's tenure and the plaintiff's right to resume. We, therefore, proceed to a survey of the course of defendant's enjoyment and deal with them as they occur in it.

Though Exhibit VI is dated 1689, it is admitted that its existence was not referred to until 1853 in Exhibit X. Defendant, however, relies, *first*, on the fact evidenced by certain copper plates, that the Thatraz was making permanent grants of land, as consistent only with his tenure having been such as Exhibit VI entails. Dealing only with those at the end of the 18th century, prior to the Permanent Settlement, I observe that the evidence for the authenticity of these copper plates is no better than that regarding Exhibit VI itself. The objection that the dates in Exhibits XXVIII, XXVIII*a*, XXVIII*b*, and XXVIII*c* are alleged to be inconsistent with one or other of the two Hindu systems of chronology, according to which they are stated, has been established as regards at least Exhibit XXVIII*c*. Exhibit XXVIII series was not produced by the grantees, when the Agent inquired into alienations of estate lands in 1896 (Exhibit QQQ); and the evidence as to custody, that of defendant's witness No. 6, does not show that it was proper, since there is nothing to connect the Seshaji Mutt referred to by him with the original grantees; the Mutt, in fact, relied also on another later grant, Exhibit CCCC, by plaintiff's predecessor. As regards Exhibit XXXII, dated 1768, there is the

evidence of the grantee's descendant, defendant's witness No. 7, and the estate manager, defendant's witness No. 14. Neither explains the recent custody of the document, or the fact that, Exhibit XXXII providing for a free grant, a quit-rent, which has once been enhanced, is now paid ; the grantee was a Brahmin, and the grant should appear in Exhibit NNI among *shrotriems*, not among *tarast* or service *inam* villages. Exhibit XXVII in 1872 is the grant of a village mentioned in Exhibits NNI and QQQ ; but no copper plate is referred to in the latter, and the evidence of 16th defendant's witness as to the amount now payable to the Thatraz is not reconcilable with them, or the terms of the Exhibit. I cannot, in these circumstances, hold that these copper plate grants have been proved, or are the grants under which the properties in question are or were held. They would, in any case, be of small weight as assertions of ownership by the Thatraz against the Maharajah, when, as appears at pages 46 to 48, District Gazetteer, the whole District was the scene of armed conflict, in which both were active. This conflict ceased shortly before Lord Hobart's *cowle* and the Permanent Settlment.

It is urged, and the lower Court has held, that there is no special probability that Exhibit VI would, if it had existed, have been referred to then by the Thatraz or Government. We have already declined to assume that Government made no enquiries and had no knowledge as to the Bissemkatak tenure.

We add that the Thatraz, who was deprived of his immediate reponsibility for collecting the *sayer*, can hardly have been ignorant of the pending Settlement and his duty to assert himself. Exhibit VII, already referred to, relates to the estate at this juncture. But we doubt whether it is safe to argue, from the reference to Samburaj in it, in favour of or against enjoyment as Thatraz by defendant's predecessor.

The amount payable under the *sanad* then granted, Exhibit B, has been referred to by the lower Court as involving a substantial correspondence between the portion of it assessed on Bissemkatak and the Rs. 2,200 specified in Exhibit VI and as, therefore, supporting the existence of the latter in 1803. The argument, by which the apportionment to Bissemkatak of Rs. 2,229 out of the total *peishkush* is reached, is that based on Exhibits VII series and X, which we have already rejected. We add only that, if the liability of the Thatraz were really fixed under Exhibit VI, the difference of Rs. 29 would require explanation and that none has been given.

As regards the next period from 1803 until about 1845, it is plaintiff's case that before 1816 the Maharajah had removed the Thatraz and resumed his estate. Defendant entirely denies this, admitting, however, that the Maharajah attempted usurpation, waged war against the then Thatraz, Ramachandra, and imprisoned him. No distinct evidence as to this period is to be expected, when (as appears from the .District Gazetteer, page 268) "Jeypore remained an almost unknown quantity to the officers of the District." Exhibit ZZ series are indeed Jeypore accounts for 1833 and 1836, showing that a varying income, corresponding neither with that secured by Exhibit VI, nor any lease elsewhere referred to, was realised; but they are of no special value. If, therefore, a conclusion is to be reached, it must rest on the evidence as to occurrences in 1845 when, according to plaintiff, the imprisoned Thatraz, Ramachandra, and his son, Krishnachandra, were dead, and the latter's son, Narendra, attempted to regain possession (*vide* Exhibit TT2 and YY6, the latter a statement by defendant's predecessor). The only definite fact is that, as Exhibit F series, suit registers of the agent's Court, show, in 1845 and 1846, Narendra sued the Maharajah for possession of the Bissemkatak estate and for Rs. 4,500 profits; and the direct inference is that the former had been dispossessed. The lower Court has refused to draw it because (1) it accepted the statement of Narendra in Exhibit X in 1853, that the suit was for surplus funds after deducting the *jamabandi*, (2) the Maharajah, defendant, applied in the earlier suit by Exhibit XXXIX for attachment of the property and, therefore, could not have been in possession of it. But the answer to (1) is, *first*, that Narendra's statements in Exhibit X, made after the beginning of the dispute with the Maharajah, cannot be evidence in his successor's favour; and *next*, that there is no reason for preferring them to the explicit statements in Exhibit F series, official records, when, moreover, there is no reconciliation between

the reference to surplus income less *jamabandi* as amounting to Rs. 4,800 and that in Exhibit F to the annual income as only Rs. 5,200. As regards Exhibit XXXIX, it is doubtful, in view of the probable laxity of procedure, whether any inference can be justified. It is, however, to be observed that if, as the lower Court held and Narendra alleged in Exhibit X, the suits were for past income only, an application for attachment of the property itself would have been out of place. The explanation is probably to be found in two facts. *Firstly*, as Narendra admitted in Exhibit X and defendant in Exhibit YY6, the former's possession had been interfered with; and *secondly*, as Exhibit E series show, Bissemkatak had been attached by Government for arrears of revenue due by Jeypore, and its release was ordered in June 1844 or about a year before the earlier of the suits was filed. This attachment is not in itself significant with reference to the independence of the former estate since, on either party's case, it would have been liable for such arrears in consequence of its inclusion in the Jeypore *sanad*. But it is at least possible that the Maharajah took this opportunity and made his application in order to impose on the Court the responsibility for terminating the confusion in enjoyment, which the attachment would have enhanced. In dealing with this part of the case, the extent to which plaintiff's contentions are conceded is material. In Exhibit X, Narendra's petition in 1853, he said that he had been compulsorily prevented from managing, and defendant in Exhibit YY6 admitted that it was only in 1842, after the imprisonment and exile of his grandfather and father, that Narendra raised his forces to regain possession. When so much is admitted, there is no reason for distrusting the explicit statements in Exhibit F series that possession was sued for, or holding that Narendra was in possession in 1845-6. The suits (and it is possible that they were really only ones re-admitted and re-numbered) were in any case dismissed for default The inference is *prima facie* that Narendra could not sustain them and had not the almost conclusive evidence, Exhibit VI, in his possession. The lower Court rejects this conclusion, *firstly*, on the ground that in the disturbed state of the country, these legal proceedings would have been "a sheer farce." But something more is necessary to explain Narendra's abandonment of litigation, which he had thought it worth while to institute. Defendant s explanation is based on the statement in Exhibit X that satisfaction was obtained from the Maharajah out of Court, presumably the lease at Rs. 1,500 referred to in Exhibit K; and it is argued that having obtained this low rental, Narendra would not have relied on Exhibit VI, which made him liable for Rs. 2,200. But Exhibit X is, as already observed, inadmissible in defendant's favour. The lease at Rs. 1,500 is referred to only in Exhibit K and it is described there as justified by the jungly nature of the estate and as merely temporary; and it, therefore, was not obviously more advantageous than the permanent tenure under Exhibit VI. Moreover, if the latter document had existed, it is to be supposed that it was known to the Maharajah, or would have been brought to his notice in the course of the negotiations ; and that its surrender would have been insisted on. The inference that Exhibit VI was not in Narendra's possession at this time must, therefore, be sustained.

This deposition of the Thatraz and his re-entry are the foundation of plaintiff's contentions, that his services were dispensed with by the Maharajah and his estate resumed, that his original right was extinguished and that, whatever its extent, the new grant under which he re-entered does not justify his present pretensions. This contention is the subject of issue V. We concur in the lower Court's finding on it in defendant's favour holding that the occurrences between 1824 and 1842 left the right of his predecessor unaffected. That decision, however, will not be of use to defendant, since we shall hold that such right was not as extensive as he alleges ; and we, therefore, give our reasons for it only shortly. *Firstly*, with reference to *Vizianagaram Maharaja* v. *Suryanarayana* (1), we do not think that the evidence establishes anything of the nature of a resumption and re-grant on a new *sanad* and different tenure, or more than a dispossession and re instatement. And next, so far as plaintiff relies on defendant's failure to regain possession by suit during his exclusion from the estate over twelve years, from 1824 till at least 1842, more probably 1846, that is supported only by reference to section 18, Regulation II

of 1802, and *Sita Ram Vasudev* v. *Khanderav Balkrishna* (2), *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande* (3) and *Gunga Gobind Mundul* v. *Collector of the Twenty-four Pergunnahs* (4). Those decisions, however, dealt with the Regulation applicable in Bombay; and the lower Court was right in following *Secretary of State* v. *Vira Rayan* (8) to the contrary effect. Reference may also be made to the decision of the Privy Council in *Fatimatulnissa Begum* v. *Sundar Das* (14) on section 1, Act XIV of 1875, a provision similar to that in the Madras Regulation. Authority is against plaintiff's contention and it must fail.

The lease at Rs. 1,500 is referred to in Exhibit K as granted by the Maharajah. But in the plaint it is alleged as granted by his son who was at feud with him, and as subject to a further obligation for service with 700 *paiks* (men-at-arms). We shall return to the evidence regarding service. It is sufficient that this lease was superseded by another in 1854 at Rs. 2,500 with the same condition for service. The lower Court's finding to that effect is not disputed, and the objections to it and subsequent leases based on coercion and misrepresentation have not been pressed in this Court. Reference has already been made to Exhibit X and the Agent's attempted negotiation in 1853 in connection with the alleged first reliance on Exhibit VI; and it is now to be noted that the failure of the Thatraz to appear before him and produce that document acquires additional significance in view of his further failure to rely on it to resist the enhancement of rent, which took place in the following year. There is, moreover, the fact that the translation given in Exhibit X of the copper plate then referred to differs from Exhibit VI in the important respect that it does not specify the Thatraz or any other person as grantee, an omission not likely to have been due to inadvertence in the circumstances. There is, accordingly, room for doubt whether Exhibit VI was in fact referred to in Exhibit X and strong reason against belief in the Thatraz's possession of it. There is no suggestion in Exhibit YY6 that this rent of Rs. 2,500 was not paid from 1855 to 1863; and Exhibit WW, a return submitted to Government in 1862, refers to it. The fact that this lease was superseded in 1864 by another at Rs. 5,000 is not disputed here. It is, however, contended that the latter had no effect, because there is no evidence of any payment of rent under it, and that it involved no enhancement of rent, because it included in addition to Bissemkatak additional land, the Rayabiji Muttah. But, the lease being admitted, it is for defendant to show that it was ineffective; and, though there is no evidence on either side as regards the period, there is again no suggestion in Exhibit YY6 consistent with defendant's contention, and there are explicit references to this lease in the next lease, Exhibit HHH1 and Exhibit HHH2. The argument that there was no enhancement is untenable, being based only on the fact that in 1865 the Diwan of the Thatraz remonstrated with the Maharajah for not reducing the people of Rayabiji to submission in accordance with his promise and on the inference that Rayabiji had been newly included in the lease. That inference, however, corresponds with nothing in exhibit YY6, or elsewhere in evidence. It was not suggested in the lower Court, and it is not clear from any available information, that Rayabiji had not been leased as part of Bissemkatak throughout. The next and last lease, that in 1877, is evidenced by Exhibit HHH1, copy of *patta* obtained from the Agent's office, the original having been lost or destroyed by fire (*vide* Exhibit TT); and the first point taken against it is that it is inadmissible, because the original would be inadmissible, being unstamped. The *first* answer is that no Stamp Act is shown to have been applied to the Vizagpatam Agency, including Jeypore, after the supersession of the ordinary law in it under Act XXIV of 1839. The *next* is that the originals of Exhibit HHH series cannot be taken to have been unstamped, if a stamp was required. The burden of proof that this was so would in England be on defendant's side [*Marine Investment Co.* v. *Haviside* (5)]. But, even if the law is different in India, we should still hold on the evidence that Exhibit HHH1 had been duly executed. The oral evidence of persons who saw it is interested and untrustworthy on both sides.

(14) 27 C. 1004; 27 I. A. 103; 4 C. W. N. 565.

Nothing can be inferred from plaintiff's failure to produce the corresponding *muchilika*, the original of Exhibit HHH2; for there is no reason for supposing that it would show whether the *patta*, Exhibit HHH1, was stamped or not. But then, apart from any presumption under section 114 of the Indian Evidence Act, there is the correspondence to be referred to, which shows that the transaction was carried through with the knowledge of the Agent and his assistant, who might, at any time, have called for the original document and would have impounded it, if it had been their duty to do so; and there is the evidence of defendant's witnesses Nos. 3 and 15 and Exhibit XXXI to show that it was actually on one occasion sent to the Agent for reference. In these circumstances, a decision is justified that it was in order and bore a stamp, if in fact a stamp was required. Defendant has applied to us to admit further documentary evidence in appeal from the records handed over to him by Government, after he attained majority. But we find that he was informed of the existence of these records and invited to arrange for their transfer by the Agent's letter, dated 22nd February 1910, filed with his affidavit, that is, after the examination of plaintiff's witness No. 11 and before his own evidence was taken. If, therefore, he had shown ordinary diligence, he could have produced these documents at the trial. Their admission now would, accordingly, be unjustifiable.

The evidence regarding this case is contained in Exhibits G, H, J, K, GG, RR, SS, GGG, HHH, LLL series and XXVI. It shows that owing to the failure of the Thatraz to perform what may for the present be referred to as his service on two occasions, the Maharaja proposed to resume his estate; that the Agent, who was informed of this intention, intended to inquire judicially into his right to do so or to enhance the rent, and reported his intention for the information of Government; and that, when the Settlement embodied in the original of Exhibit HHH was effected, he insisted on satisfying himself as to its terms. The proceedings were, accordingly, in no way hurried or perfunctory, and the Thatraz was in effect invited to resist an enhancement. Yet he made no attempt to do so by alleging the existence of Exhibit VI, or moving the Agent to obtain its production. The result was that he accepted Exhibit HHH with the greatly increased rental of Rs. 15,000 and an obligation for attendance with 500 *paiks*.

In the succeeding year, as Exhibit FFF shows, the Thatraz considered himself bound by Exhibit HHH1 : and Exhibit KKK series, the Jeypore accounts, justify a conclusion that payments were made in accordance with the lease until defendant's accession and the assumption of charge of his estate by Government during his minority. He, in fact, gave effect to his intention expressed in Exhibit FFF and attempted to presume on the increase in his own rent by raising that of the holders of three subordinate tenures, one created by himself, *Vide* Exhibits N, O, Q, R. From 1877 until 1890, the only other incident calling for notice is the Agent's statement in Exhibit TT2, a report in 1883, that he had heard at Bissemkatak of a copper plate *patta*, which was not then to be found. But this reference is not of weight, since there is nothing available regarding the extent of the Agent's inquiries, or the source of his information; and as he referred to the *patta* as for Rs. 2,500, it in no way probablises the case for Exhibit VI for a rent of Rs. 2,200. After Government assumed charge of the estate, Rs. 15,000 was paid annually without demur on the part of defendant's relatives, although, in recommending the assumption in Exhibit TT, the Agent had doubted "whether the grant should be acknowledged in its present permanent form." His doing so possibly led to defendant's present attempt to disclaim it. The manner, however, in which the attempt was made, indicated no intention to rely on any tenure such as Exhibit VI. For, it began with a plea in Exhibit GG, that it would be inconvenient or impossible to render service and it was only in Exhibit YYI that plaintiff was informed of the claim to hold at a permanent rent of Rs. 2,200 without service, and that claim was then based, not on Exhibit VI, but on the Permanent Settlement.

This closes the story of the relations between the parties; and the first conclusion authorised by it is against the authenticity of Exhibit VI. Whatever the interest or duty of the Thatraz to plead it up to and at the Permanent Settlement (and it is not so clear, as the lower Court supposes, that he had

none) his failure to rely on it on subsequent occasions is irreconcilable with his knowledge, or possession of it, or its existence. It has already been shown that the evidence as to its custody immediately before its production in 1891 is unsubstantial. In these circumstances, we cannot make any presumption under section 90 of the Indian Evidence Act regarding it and we, therefore, dismiss it from consideration, finding issue II in plaintiff's favour.

This result reached and defendant's arguments founded on Exhibit B series, VII series and IX having been rejected, there is no reason against accepting plaintiff's contention, based on the explicit and unqualified references to Bissemkatak in Exhibits A and D, that it formed part of the assets on which plaintiff's *zamindari* was permanently settled and was not treated as *lekhiraj* or land exempt from the payment of public revenue. That is our finding on issues I and III. The question is then whether the Maharajah was entitled to make the subsequent enhancements of rent and whether plaintiff is entitled to claim at Rs. 15,000, the rate provided in Exhibit HHH1.

Defendant relies in this connection on the reference in clause 4 of the *sannad*, Exhibit D, to "alienated lands, paying a small quit-rent, (which quit-rent, unchangeable by you is included in the assets of your *zemindari*)" as an unqualified prohibition of enhancements, such as plaintiff has proved. Comparison of the clause with the corresponding section 4 of Regulation XXV of 1802 shows that "a small quit-rent" meant a favourable one. But the provision is otherwise obscure and we have been shown no authority explaining it. Argument has been based on section 12. It, however, forbids only the appropriation of land to religious or other purposes with the intention that it shall be exempt from its portion of the public tax and the resumption or enhancement of the assessment on land already so appropriated at the date of the Settlement. We observe, *first*, that the word "alienated" in clause 4 is, in our opinion, to be understood as covering only permanent grants, since there is no warrant in authority or practice for applying it to mere temporary leases, however long their currency, such as those pleaded by plaintiff, which are not shown to have been, or to have been understood by the parties to them as being, permanent. *Next*, none of those leases is shown to have been at a favourable rent. For, the only evidence as to the actual yield of Bissemkatak is the Circuit Committee's account, Exhibit NNI, and we agree with the lower Court that it is of little value [*vide* also *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur*(13)] and there is nothing improbable in the suggestion made in Exhibit K and elsewhere that the rent was increased, as the country was reclaimed. *Lastly*, clause 4 in our opinion, prohibits enhancements imposed by the *zemindar*, not those, to which the lessee consents, as we have found that the Thatraz did in the present case. In the result we find on issues VI—VIII and XVII that the rent of Rs. 15,000 and the other enhanced rents accepted previously in 1854 and 1864 were not within the mischief of, and the first mentioned is not unenforceable by reason of, clause 4 of Exhibit D. No other objection has been argued in this Court in this connection, and plaintiff is, therefore, entitled to recover the amounts claimed by him in accordance with Exhibit HHH1.

His *remaining* claim, to resume defendant's estate, must be dealt with on consideration of the service character of its tenure. For, it is not suggested that defendant would not be entitled to relief against the forfeiture incurred in respect of his default in payment of rent; and his description of his holding as independent and permanent at a fixed rent in Exhibit BB is not such a repudiation of his landlord's title as would entitle plaintiff to relief [*Kali Kishen Tagore* v. *Golam Ali* (9), *Kali Krishna Tagore* v. *Golam Ally* (10) and *Unhamma Devi* v. *Vaikunta Hegde* (11)]. Detailed reference to the evidence as to service has hitherto been postponed for the sake of clearness; and we now refer shortly to the law before dealing with it. Numerous authorities have been cited. But it is useless to refer to cases such as *Raja Venkatarangayya* v. *Poranki Appalarazu* (3) and *Parthasarathy Appa Rao* v. *Secretary of State* (7), in which the claim to resume was made by Government, not the *zemindar*, when the material principles really lie in a small compass and can be gathered directly from two decisions, one of them recent, those of the Privy Council in *Forbes* v. *Meer Mahomed Tuquee* (12) and *Venkata Narasimha Appa Rao*

Bahadur v. *Sobhanadari Appa Rao Bahadur* (13). The *first* condition, on which they contemplate resumption as permissible, is that the estate shall have been included in the assets of the *zemindari* on which the Permanent Settlement was made ; our finding of fact already reached entails that this condition is complied with, and it is unnecessary for us to found our conclusion on the presumption based on the nature of the service, regarding which argument was offered. The next condition is that either the grant is for service in lieu of wages, in which case the grantor's right to resume is absolute, or that, if the grant is of an estate burdened with service, the grantee, even if that service is obsolete or unnecessary, is unwilling or unable to perform it. In the present case, however, it is in fact unnecessary to inquire which of these descriptions is applicable to the grants, because in his letter, Exhibit BB, defendant denied his obligation to render service and impliedly refused to perform any; and such inquiry would, moreover, be meaningless, because both descriptions assume that an enforceable obligation for service is in question, and we shall hold in accordance with defendant's contention that none is established. In these circumstances we do not consider at length how far the tenure of Bissemkatak possesses the characteristics of a grant subject to a burden of service enumerated by this Court in the portion of its judgment in *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Rao Bahadur* (13), which the Privy Council adopted. For only the presence of the second, fixity of tenure, could be discussed. As to it, a finding in the negative would follow from our conclusion that the rent was enhanced on three occasions.

The lower Court's findings are that the nature of the service up to 1863 was uncertain and that after that year it was rendered as matter of courtesy. It did not decide, as we are asked to do, whether anything which can be described as service is exigible from defendant at all. His obligation is described in Exhibit HHHI as attendance (1) with 500 *paiks* at Dusserah on the occasion of the annual festival and Durbar and (2) whenever such attendance is directed, when the Thatraz goes on *sircar* business. The question is whether this description, read in the light of history, or as it stands, involves anything enforceable as a condition of the holding.

There is little doubt that prior to Permanent Settlement Bissemkatak was held primarily on a military tenure. No doubt, the only distinct evidence to that effect is Mr. Oram's statement in Exhibit NN1. But the fact would be in accordance with the usage of this part of the country, as disclosed elsewhere in that report and the Gazetteer; and there is defendant's admission in Exhibit YY6, in accordance with his predecessor's statement in Exhibit X, that Malloo Mahunty, who held the estate in the seventeenth century, "formed a well-organised force of armed men to protect himself" and that his son promised Jeypore "military aid in exchange for a formal acknowledgment of his title." Such military arrangements, of course, should have ceased with the Permanent Settlement in 1802; and it cannot matter that the unauthorised maintenance of armed force was actually continued till later, except in so far as it can be shown that those forces also performed private service, which the law permitted. Such maintenance is, in fact, referred to by Col. Campbell in 1852, in Exhibit XXVII*a*, when the Thatraz used his force against that "of his superior of Jeypore." And in Exhibit XXVIIb, in 1861, Sir W. Robinson wrote regarding the absence of any provision of Government for Police and Magistracy in Jeypore and the anarchy which had resulted from the failure to assume control from the *zemindar*, who was not providing for it efficiently. In 1863, when the Government Police was established, the Agent, Mr. Carmichael, in Exhibit XXIV, stated that the Thatraz had been maintaining two hundred salaried peons and that every third man in Bissemkatak village swaggered about with a sword. He said that Jeypore "though everywhere acknowledged as Suzerain, had not always the direct control," and made the first distinct allusion to the nature of the service as having been "commuted into a yearly tribute of Rs. 2,500; besides which, when specially called on to do so, the feudatory is expected to accompany the Suzerain with a numerous retinue on his travels. The last occasion of his doing so was during the visit paid by the present Rajah of Jeypore to the Rajah of Vizianagram in 1859. The

Thatrajah then came forward with a rabble of five hundred men." The questions to which the existence of these irregular forces gave rise, were in fact stated twice from the point of view of Government by another Agent, Mr. Goodrich, in 1875 and 1877, in reports, Exhibits XXV and XXVI. In the first, with general reference to the Jeypore Agency, he mentioned the existence of "a numerous body of *paiks*, whose tenures require revision. Upon them, by the tenure of their assigned salaries or favourably assessed lands, are incumbent the Police duties of the country, the guarding of prisoners, the escort of treasure and the general duties of subordinate revenue servants." In the second, on the occasion of the death of one Thatraz, he spoke of enhancements of rent by the Maharajah and went on to refer to the subsistence of customary service after its original military justification had been abolished. In both reports, although his point was the advisability of Government taking advantage of the service, he recognised that its character had changed and in the earlier he defined its subsisting civil and private characteristics. The period was one of transition and the evidence regarding it general, the one reference in it to a particular incident, the journey to Vizianagaram, being misleading, since "the present Maharajah" in 1893, the date of Exhibit XXIV, had inherited in 1860 (*Vide* Gazetteer, page 264) and the action of the Thatraz in accompanying him in 1859 before his accession is, therefore, inconclusive and may perhaps have been part of one of the latter's intrigues against his predecessor (Gazetteer, pages 268, 269). The result is, at most, that the service, after the loss of its military character, was still regarded as subsisting for private purposes and more loosely, for such purposes as the disturbed and unorganised condition of the country led the Maharajah to provide for until about 1863. Those purposes probably included such duties in respect of the maintenance of law and order as the Code of Criminal Procedure would have imposed on landholders on the plains. But there is nothing to support a distinct conclusion as to what they were, or to show that they were of a public nature or to explain or define the terms of Exhibit HHHI.

The evidence as to the service of 700 *paiks* stipulated for by the lettings in 1854 and 1864 is general. In Exhibit UUU Government opined that the service was to wait on the Maharajah with a retinue of *paiks* or peons on occasions of importance, consistently with the terms of the lease of the same year, Exhibit HHHI, which have already been given. After 1877, we have indications that the Thatraz was regarded by Government as able to embody some sort of force, Exhibit AAAA series and Exhibit XXII*b* and Exhibit XXII*c*. But they do not entail his being in any way subject to Jeypore for the purpose. For they are all calls for assistance in quelling the same disturbance in 1880; and it is not material that Exhibit AAAA series were addressed to the Maharajah, when the other two were addressed to the Thatraz direct. As regards the duty to attend at Dusserah, default in it had been the beginning of the incidents which resulted in Exhibit HHHI in 1877. The correspondence has already been referred to and no doubt indicates that the Thatraz did not demur to the Maharajah's pretensions. Subsequent exhibits, Exhibit CCC series and TT2, show that up to 1887 there had been attendance at Dusserah in some years and apologies for absence in others. During the minority of defendant from 1889 till 1903 the obligation to attend was commuted by the Agent in charge of his estate for a money payment, apparently without demur from his relatives. But on attaining majority, defendant, as already stated, having at first explained his absence on grounds of inconvenience, finally disclaimed all obligation in Exhibit BB.

The evidence, so far referred to, relates only to attendance at Dusserah, that being the first condition referred to in Exhibit HHHI. The second condition, attendance when on Sircar business, is so indefinite as to be unenforceable; and we refer to it no further. It is, accordingly, on the character of attendance at Dusserah as an enforceable condition of the tenure, that plaintiff's case depends. We do not think that attendance on ceremonial occasions is such a condition. No witness, who spoke to the course of the Durbar which is held, described anything beyond the compliments usually paid by an inferior to a superior as passing; and we have been referred to no authority dealing

with a claim to resumption, in which an obligation merely to be present, even accompanied by a retinue, was regarded as sufficient. In every case, the service consisted in the doing of some act for the benefit of the grantor; and we have been shown no reason why less should be required to prove the service character of the tenure here. Defendant's duty is at most analogous to that of English copy-holders to do suit in the Court of their manor; and default in it will not entail termination of the holding [Halsbury's Laws of England, Volume VIII, page 14].

Default in this attendance being insufficient to support plaintiff's claim, he has attempted to prove that a further duty, not referred to in Exhibit HHH or definitely in any record, has been annexed to it by custom, that of guarding the idol, which on the occasion of the Dusserah is taken in procession, and he has argued that some inference as to the existence of definite enforceable duties is entailed by defendant's enjoyment of the title of Thatraz, signifying lord of the army. The *second* point can be dealt with shortly. We no doubt find defendant's predecessors enjoying that title from the earliest times and there are references, for instance in Exhibits HH, YYY, XXVI, to some sort of investiture, though it is not clear that it related to the title, not the estate. But it does not follow that any office, or, after the abolition of the military service, any distinctive duties were in question. For the defendant's witnesses speak of other petty tenure-holders, described only as Patros, fulfilling similar, though smaller, obligations in the way of attendance with *paiks* at Dusserah, and the lower Court has mentioned two *zemindars* whose use of the title of Thatraz is recognised, though they are independent of any superior (Gazetteer, page 298). There is, accordingly, no reason for presuming any connection between the title and subsisting obligation for service.

Lastly, as to the evidence that the Thatraz is bound to provide a guard for the idol, it is that his *paiks* take part in the procession and that a few of them guard the temple; but it includes no reason for assuming that they do so in the performance of a duty, and not in the enjoyment of a religious privilege. There is some evidence, that of 6th, 7th, 9th plaintiff's witnesses, that they received *batta* from the Maharajah. But it is contradictory and worthless; and, as it does not show whether the payments were simply for expenses or included remuneration, it would, if accepted, prove nothing. In these circumstances we find that no duty to guard the idol is established. As we have found that mere attendance with *paiks* at Dusserah is not a service default in which would justify resumption, our decision on issues IX and X must be against plaintiff's right to resume.

We, accordingly, allow the appeal, modifying the decree of the lower Court to the extent that plaintiff will have decree for Rs. 45,000 in respect of the *kattubadi* or rent due for *Faslis* 1313, 1314, 1315, with interest at 6 per cent. per annum to date of lower Court's decree and subsequent interest at 6 per cent. This suit is in other respects dismissed. Each party has failed as regards a substantial part of his case. We, therefore, make no order as to costs in either Court.

SANKARAN NAIR, J.—I agree. The compromise of 1877 and the exchange of *patta* and *muchilika* in the same year are not denied in appeal The Agent holds that the agreement is illegal as it is opposed to section 4 of the Permanent Settlement Regulation of 1802 and clause (4), Exhibit (D).

I am unable to agree with the Agent that the agreement is illegal on that ground. If Exhibit VI is genuine, there is nothing to show that the amount payable under it was only a quit-rent and there is no pretence for saying that it was a favourable quit-rent. But I agree with my learned brother that it is unsafe to act upon Exhibit VI.

The above observation as to the rent under Exhibit VI applies also to the amount, if any, payable to the plaintiff according to Collector Alexander in 1803. The increase of rent on more than one occasion, with the knowledge and approval of the Collector, and the reason assigned for it, *i.e.*, increase in cultivation, show, on the other hand, that what was paid was not quit-rent. Nor is there anything to show that what the chief of "Bissemkatak" was liable to pay before the Permanent Settlement was rent for the use of land. It might have been tribute that he paid. In fact, there is no evidence to show the legal relation which subsisted

between Jeypore and Bissemkatak, or that it was under a grant from the Jeypore Rajas that the Bissemkatak chief acquired this tract of country. It was not "alienated" land under clause (4), Exhibit D. Again, if the latter was liable to render military service to his Sovereign, then he was not holding the land for any quit-rent only and on that ground also the section would not apply.

For these reasons I hold that the agreement is legal and valid.

The defendant must, therefore, pay the rent due under the *patta* and *muchilika*.

It was then argued that according to the terms of the *patta*, the defendant is bound to render service and as he has failed to do so, the plaintiff is entitled to recover possession. Assuming the defendant is bound to render service under the agreement of 1877, there is nothing to show that the defendant forfeited the *raj* on default to render the same. The *patta* does not make it a condition. Considering that the chief of Bissemkatak was a ruler and a landed proprietor, who held land brought by him under cultivation, very strong evidence is required to prove any condition of forfeiture as alleged by appellant. The nature of the so-called service places the matter beyond doubt. The alleged service is said to be attendance at the Dusserah festival and for certain other cerèmonial purposes. Besides being indefinite, this is not service. It is only a mark of respect which every person, even an official, is expected to pay and pays to his superior. I agree with what my learned brother has said on this question.

On this view, it is unnecessary to consider the relations of the parties before the agreement. If it is, I agree with my learned brother in his observations with one exception. I do not think that sufficient reasons have been shown to differ from the finding of the Judge in paragraph 19 of his judgment that the grants made by the Bissemkatak chief are genuine. This, however, does not affect the result.

Appeal allowed; Decree modified.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 84 OF 1914.

April 1, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justic- Tyabji.

MUNICIPAL COUNCIL, KUMBAKONAM —RESPONDENT—APPELLANT

versus

R. SADAGOPACHARIAR—PETITIONER—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 583—*Application for restitution—Reversing decree, whether contains direction to restore any benefit received—Civil Procedure Code (Act V of* 1908), *s.* 144, *scope of.*

Applications made to obtain restitution under section 583 of the Civil Procedure Code, 1882, are proceedings in execution of the appellate decree, which the successful party has the right to treat as containing a direction to the other party to restore whatever benefit the latter has derived through execution under the reversed decree. [p. 381, col. 2.]

Venkayya v. *Raghavacharlu*, 20 M. 448, followed.

A decree for restitution passed in favour of a person in 1907 cannot be deemed to have ceased to exist in 1909 and can be executed whether an order of the first Court directing such restitution has been passed or not. [p. 381, col. 2.]

Section 144 of the new Civil Procedure Code does not apply to decrees passed before the Code came into force. [p. 381, col. 2.]

Appeal against an order of the Court of the Subordinate Judge of Tanjore, in Execution Appeal No. 2504 of 1912, in Original Suit No. 23 of 1902.

FACTS.—In 1904 the Kumbakonam Municipality obtained a decree against one Raman Chetty, a toll gate contractor, for about Rs. 5,000. In 1907 he got this decree reversed by the High Court on appeal, on the ground that the Municipal contract with him was not in writing as required by section 95 of the District Municipalities Act. The Municipality before the reversal of the decree had executed it and obtained Rs. 1,200 in cash from Raman Chetty : it had also attached a debt due to Raman Chetty by the Dharmapuram Pandara Sannadhi. For releasing this attachment the Pandara Sannadhi had executed a promissory note to the Municipality in 1906 for Rs. 2,300 for which the Municipality entered satisfaction. The present respondent along with other decree-holders attached Raman Chetty's right to restitution as against the Municipality. In 1911 the respondent put in an execution application to obtain restitution not only for the Rs. 1,200 paid in cash to the Municipality by Raman Chetty,

but also for the Rs. 3,200 due under the pronote for which satisfaction had been entered. The Sub-Judge of Tanjore allowed restitution only for the Rs. 1,200 and disallowed the remainder. This appeal is against that order.

Messrs. *S. Srinivasa Aiyangar* and *N. Rajagopalachariar*, for the Appellant, contended:—(1) Under section 144 of the new Civil Procedure Code the application was not one in execution, (2) as it was filed more than three years after the reversal of the decree, it was barred by limitation, (3) even if it were otherwise, a separate order entitling restitution was necessary before applying for execution, as enunciated by the decision in *Vasudeva Ravi Varman* v. *Narayana Pattar* (1), and (4) as the application was put in after the new Civil Procedure Code, it was governed only by the new Act.

Messrs. *K. R. Subramania Sastri* and *V. Venkatachariar*, for the Respondent, argued *contra*.

JUDGMENT.—The questions for consideration are :—(1) Whether an application for execution to obtain the benefit of restitution, which a person became entitled to by reason of an Appellate Court having reversed the decree of the Court of first instance, is an application for execution of the decree passed on appeal, the reversing appellate decree being dated in 1907 before the new Civil Procedure Code came into force. In other words, whether the party who succeeded in the appeal has got a right to treat the appellate decree as not only a decree reversing the decree of the first Court, but also as a decree containing a direction to his opponent to restore whatever benefit the latter had derived through execution under the reversed decree.

(2) If the above question is answered in the affirmative on the construction of section 583 of the old Civil Procedure Code, whether the successful party in appeal lost the benefit of that portion of the appellate decree which granted restitution, by reason of the repeal of section 583 of the old Code and the substitution of section 144 (1) and (2) in the new Code.

(1) 24 M. 343

In *Venkayya* v. *Raghavacharlu*(2), it was held [dissenting from an *obiter dictum* in *Kurupam Zemindar* v. *Sadasiva* (3)] that applications made to obtain restitution under section 583 (old Code) are proceedings *in execution of the appellate decree*. The language of section 583 also clearly supports that view, the important words being "decree passed in an appeal obtains execution *of the same*" and "such Court shall proceed *to execute the decree passed in appeal.*" The ruling in *Vasudeva Ravi Varman* v. *Narayana Pattar* (1), on the other hand, treats the application to obtain the benefit by way of restitution as an application *sui generis*, and not an application for execution of the appellate decree. We do not think it necessary to refer to the other numerous cases decided in all the Indian High Courts relied on by both sides on this question and on the connected questions, including the point whether the successful appellant has the right to bring a separate suit for obtaining the benefit of restitution besides the right to apply under section 583. Most of those questions are now only of academical interest after the enactment of the new Civil Procedue Code. The appellate decree of 1907 having been passed when the old Code was in force and the view enunciated in *Venkayya* v. *Raghavacharlu* (2) being, in our opinion, the sounder view, the appellate decree passed in 1907 must be treated as having contained a direction for restitution, which direction *could be enforced in execution of that appellate decree*.

On the *second* question we are clear that a decree for restitution passed in favour of a person in 1907 cannot be deemed to have ceased to exist in 1909, *assuming* (*without deciding*) that by reason of section 144 of the new Code, a reversing decree passed on appeal after the new Code came into force should not be treated as containing a direction for restitution, till an order is passed by the Court of first instance on the application of the successful appellant directing such restitution.

Admittedly no question of limitation arises if the appellate decree of 1907 is treated as an executable decree for restitution.

(2) 20 M. 448.
(3) 10 M. 66.

This appeal by the judgment-debtor (in restitution proceedings) is, therefore, dismissed with costs.

Coming to the memorandum of objections, the representative of the decree-holder in restitution (who is the respondent before us) contends that because the restitution-judgment-debtor obtained a pro-note from a debtor of the decree-holder for Rs. 2,300 and entered up partial satisfaction of the reversed original decree to that extent, he (the restitution-judgment-debtor) is bound to give back the entire sum of Rs. 2,300 in restitution, and not merely the sum of Rs. 1,200 and odd which he recovered on the strength of the pro-note before the decree was reversed. We think that as the restitution-decree-holder's debtor executed the pro-note to the restitution-judgment-debtor in the latter's capacity as attaching decree-holder under the first Court's decree, the obligation under that pro-note ceased to bind the garnishee as soon as that decree was reversed, because the garnishee executed the pro-note (according to the affidavit of the respondent's agent on the record) not at the request of the restitution-decree-holder (in which case it might be fairly argued that the pro-note did not become void for failure of consideration on the reversal of the first Court's decree), but by arrangement between the garnishee and the respondent as between themselves, the consideration for the pro-note being the then existing right in the respondent to proceed through Court against the garnishee and to recover the money due to the restitution-decree-holder. That considerarion failed as soon as that right of the respondent was extinguished by the appellate decree and the respondent could not thereafter recover anything under the pro-note. The restitution-judgment-debtor (appellant) was, therefore, liable to restore only the Rs. 1,200 which he had actually received before the reversal.

The lower Court's order was, therefore, right on this point also and the memorandum of objections is also dismissed with costs.

Appeal and memorandum of objections dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 763 OF 1911.

March 20, 1915.

Present:—Justice Sir Donald Johnstone, KT., and Mr. Justice Shah Din.

RAHIM BAKHSH—DEFENDANT—APPELLANT

versus

UMAR DIN PLAINTIFF—RESPONDENT.

Custom—Gulfarosh Arains *of Lahore city—Will —Burden of proof, nature of.*

Among the *gulfarosh Arains* of Lahore city there is a custom of Will-making contrary to Muhammadan Law. [p. 384, col. 2.]

The burden of proving such a custom lies on the person who asserts it, but in view of the fact that the tribe is a mere fragment of a very large body of *Arains*, who are agriculturists and follow, except as regards certain things, ordinary Punjab custom, the burden is not a heavy one. [p. 383, col. 2.]

The fact that a party has repeatedly by act or word shown that he does not really follow a particular law, though it does not amount to an estoppel against him, still shows the views held by the party. [p. 385, col. 1.]

Instances in support of an alleged custom are not always to be treated as of little or no value because supported only by oral testimony; if the deponents have means of knowledge and the opposite party makes no attempt to rebut, facts stated may often be accepted as proved. [p. 385, col. 1.]

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 9th May 1911, reversing that of the Subordinate Judge, first Class, Lahore, dated the 31st May 1910, dismissing the claim.

Messrs. *Fazl-i-Hussain*, *Roshan Lal* and Moulvi *Fazl-ud-Din*, for the Appellant.

The Hon'ble Mr. *Muhammad Shafi*, K. B., and Lala *Gopal Chand*, for the Respondent.

JUDGMENT.—We have heard this case argued by Mr. Fazl-i-Hussain on behalf of defendant-appellant and Mr. Muhammad Shafi on behalf of plaintiff-respondent. Plaintiff having sued for possession by partition of 1/6th of certain (5) houses under a Will, defendant raised various pleas, the decision in the first Court being against the plaintiff whose suit was dismissed with costs. Leaving out the first two issues which are connected with questions of fact concerning two shops and a house, with which questions we have now little further concern, the findings of the first Court were that the parties follow Muhammadan Law; that the Will of Mahtab, whose property is in suit, was duly executed by him but was invalid inasmuch as the consent of defendant, required by Muhammadan Law, had been

withheld; that under Muhammadan Law plaintiff would be entitled to 1/16th only of the property, and that he would not by this suit get even that, inasmuch as he had left out of his claim a certain house (called the Sathan house), which had been found to be joint property and which forms the subject of the second issue.

The lower Appellate Court, after finding the first and second issues (both of fact) exactly as the first Court found them, held that, while the parties are "probably governed by Muhammadan Law as a general rule," they follow custom in regard to the making of such Wills as the one in suit; that under their custom this Will is valid; that the execution of the Will is proved and that it was not necessary for plaintiff to prove the testator's soundness of mind, as defendant put in no plea to the contrary; that plaintiff was in genuine doubt as to the real fact in regard to the aforesaid Sathan house and never intended to omit any joint property and was, therefore, entitled to amend his plaint even at that stage. The Court, therefore, allowed amendment and gave plaintiff a decree (with half costs) as prayed, except as regards the two shops with *baithak* dealt with in the first issue.

Defendant has now come up here with a further appeal. He contends that the onus is on plaintiff to prove a special custom and that he has failed to prove it; that defendant has proved that the family follow Muhammadan Law; that former statements and admissions by defendant on such a point should not be brought up against him; that the Will is "neither legally proved nor is valid"; that amendment of the plaint should have been refused.

A good deal of this can be disposed of in a few words. In our opinion this amendment of the plaint was clearly not contrary to law,* and it appears to us eminently just and reasonable. We cannot improve upon the lower Appellate Court's own way of justifying it, and we endorse it. *Then*, the Will is certainly "legally proved", for we have concurrent findings that it was executed, and we agree with the lower Appellate Court that it was too late to start before it a new case upon a new plea that testator was not of sound disposing mind at time of execution. *Thirdly*, defendant has certainly not proved postively that the family follows personal law and in argument this has hardly been insisted upon. The whole length Mr. Fazl-i-Hussain found himself able to go was that in certain matters Muhammadan Law is, followed, that no special custom validating such a Will as this is established, and that, therefore, on the authorities, the Court must fall back on the personal law of the parties. It follows that the real question for debate is whether the plaintiff has shown that the family does follow a custom under which this Will is valid. [We decline to allow appellant to raise at this stage, as Mr. Fazl-i Hussain attempted to do, an objection that the suit cannot succeed because all the beneficiaries under the Will have not been impleaded. This has never been mooted before and is not even to be found in the grounds of the present appeal.]

The first remark we have to make is that it is not necessary, as Mr. Fazl-i-Hussain seemed to suggest, that these *gulfarosh Arains* of Lahore City follow agricultural custom in its entirety, or are governed in all matters by the same rules as the real agricultural *Arains* of Lahore Tahsil. It is enough if they can show that there is a practice of Will-making among them, that Muhammadan Law is in important points departed from, that, in particular, several Wills in violation of Muhammadan Law have been executed and not set aside, and that defendant has himself acquiesced in such violations of Muhammadan Law. These are the general lines on which the lower Appellate Court has proceeded, and we think all that is now required is to see whether the above *desiderata* have been achieved with reasonable completeness by the plaintiff. The burden of proof is no doubt on the plaintiff in view of *Miran Baksh* v. *Musammat Allajawai* (1) and *Musammat Talia Bibi* v. *Mehr Bakhsh* (2); but considering that this tribe is a mere fragment of a very large body of *Arains*, who are agriculturists and follow (except, as regards the rights of certain females) ordinary Punjab custom, we cannot hold that the burden is a very heavy one.

The Will was executed on 8th August 1899 and was registered. It left half of testator's houses (5 of them) to his wife, his daughter and his nephew son-in-law, the plaintiff

* Order VI, rule 17, Civil Procedure Code.

(1) 25 P. R. 1882.
(2) 72 P. W. R. 1908.

Umar Din. Defendant, the objector, is testator's brother.

The authorities may be briefly noticed first. *Miran Baksh* v. *Musammat Allajawai* (1) is a case in which it was held that among these *gulfarosh Bhatti Arains* of Lahore and Amritsar no special custom contrary to Muhammadan Law had been proved under which brother's sons exclude sisters *from inheritance*. The case was not one of gift or Will but of succession pure and simple and the ruling does not lay it down that these *Arains* do as a matter of fact follow Muhammadan Law generally but merely that, being city people and non-agriculturists, a special custom anent this particular matter of succession must be made out.

Musammat Talia Bibi v. *Mehr Bakhsh* (2) is a case of Lahore *gulfarosh Arains*. It is held there that the onus of proving a special custom contrary to personal law was on the persons asserting it, and that at best the evidence of such custom was conflicting. There a lady had gifted to her daughter's daughter property which had many years before been gifted to herself by her late husband, and the decision of the Bench proceeded really on two grounds *viz.*, that the plaintiffs, collaterals of that husband, had not proved a special custom allowing control by them of the widow's gift, and that the gift to the widow was so old, and was so clearly an out-and-out gift, that she had certainly by it and by lapse of time become absolute owner and so was emancipated from all trammels of custom, if any existed. It seems to us in these circumstances that it was hardly necessary to decide the question of custom *versus* law at all, and further that the decision on that question goes no further than this, that the plaintiffs in that case had not shown that they could control the act of a lady, widow of their agnatic relative, who had disposed at her Will of property which she had received from her husband as an out-and-out gift 20 or 30 years earlier. It is impossible to deduce from this any authority to the effect that among these same people a man can control the act of his brother who, wills property to his wife, daughter and son-in-law. At most the ruling can only be used in connection with the laying of onus, and even so we do not think the onus a heavy one. The evidence as to custom was not discussed, but only alluded to in very generally terms.

Musammat Fakhar-un-Nissa v. *Malik Rahim Bakhsh* (3) and *Daya Ram* v. *Sohel Singh* (4) have also been cited by appellants, but the former is of no help to us, and from the latter we only gather this that, where custom applicable to a particular point is not proved, personal law must be resorted to.

It follows that this case must be decided on its own record. The learned Divisional Judge has detailed ten indications in favour of respondent-plaintiff. We have heard all the evidence very exhaustively discussed, with the result that we find that in this comparatively small section of *Arains* of Lahore city in the last 20 years or so several Wills have undoubtedly been executed and that in more than one connection Muhammadan Law is departed from. The Wills relied upon by Mr. Shafi (for plaintiff-respondent) are:

(*i*) Ala-ud-Din's Will, 18 years old, in favour of his daughters in presence of collaterals: depends on statement of P. W. No. 1 alone, but is uncontradicted.

(*ii*) Jowaya's Will, 9 years old, to daughter and son-in-law, in presence of near collaterals: depositions of P. W. No. 1 and P. W. No. 3 and P. W. No. 4, and the document itself.

(*iii*) Jani's Will, 22 years old, to his wife, in presence of collaterals: P. W. No. 3.

(*iv*) Jani's widow's Will, 5 years old, to daughter's daughter and latter's husband: P. W. No. 1, P. W. No. 3.

(*v*) Chaughatta's Will, 4 years at least old, to grandson, in presence of collaterals: P. W. No. 1 and P. W. No. 4.

(*vi*) Nabi Bakhsh's Will, 16 years old, to daughter in presence of nephews: P. W. No. 1 and P. W. No. 3.

(*vii*) Jalal-ud-Din's Will, to his son: P. W. No. 4.

(*viii*) Mutwala's Will: D. W. No. 4 in cross-examination.

(*ix*) *Musammat* Mehran's case; see page 8,

(3) 23 P. R. 1897.
(4) 110 P. R. 1906 (F. B.); 31 P. L. R. 1907; 59 P. W. R. 1907.

paper-book, instances 6 and 7: this was admitted by defendant.

(*x*) Mahtab's own earlier Will of 1895 was attested by defendant himself. That Will was on the same lines as the present one, the only difference being that the son-in-law then was defendant's own son, who has since died, his young widow being re-married thereafter to plaintiff Umar Din.

Mr. Fazl-i-Hussain criticises these instances. He says (*i*: was not acted upon, the property being in the end divided according to *Shara*. No doubt Khandu, P. W. No. 7, says boldly something of this sort, not really knowing what division under *Shara* would have brought about. The Will was in effect acted upon, and it contravened Muhammadan Law. Then he points out that (*iii*) and (*iv*) were rather gifts than Wills and this seems correct.

(*v*) was also attested by defendant. Mr. Fazl-i-Hussain makes nothing of his attack on it.

(*vi*) is attacked on the ground that P. W. No. 1 and P. W. No. 3 do not describe the beneficiaries precisely similarly and that the record of the litigation referred to by the witnesses should have been produced. The *first* objection is of no importance, one witness merely adds a widow as legatee, and as to the *second* objection it is much minimised by two circumstances, namely, that the dispute was compromised and that P. W. No. 3, being mixed up in the litigation, has personal first-hand knowledge. Here we may express the opinion that instances in support of an alleged custom are not always to be treated as of little or no value because supported only by oral testimony: if the deponents have means of knowledge and the opposite party makes no attempt to rebut, facts stated may often be accepted as proved.

It may be conceded that instances (*vii*) and (*viii*) are of little or no value, but (*ix*) and (*x*) undoubtedly are.

Apart from these Wills it is clear that defendant, who now finds it convenient to hold out for strict personal law, has repeatedly by act and word shown that he does not really follow that law. The lower Appellate Court has brought this out very clearly, and we cannot agree with Mr. Fazl-i-Hussain that this is immaterial. We do not say it raises an estoppel against defendant, but it shows the views held in the past by defendant, who seems to have busied himself a good deal with the affairs of the brotherhood and their dealings with property: see especially defendant's statement, Exhibit K, as to adoption by *Musammat* Mehran, as to Will by her, as to Wazir's property being willed to his wife, contrary to Muhammadan Law, and as to a customary form of adoption as prevalent in the tribe.

On the whole we think the plaintiff has shown that this Will is valid and we dismiss the appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2490 OF 1913.

March 2, 1915.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Richardson.

NAZIMULLA--DEFENDANT No. 1—APPELLANT

versus

WAZIDULLA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Right of way, suit for establishment of—Limitation Act (IX of 1908), s. 23, applicability of—Water-course and way distinguished, obstruction to—Continuing nuisance.

The obstructions which interfere with the flow of water are in the nature of continuing nuisances, as to which the cause of action is renewed *de die in diem* so long as the obstructions causing such interference are allowed to continue. [p. 386, col. 1.]

Rajrup Koer v. *Abul Hossein*, 6 C. 394 (P. C.): 7 C.L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530, referred to and followed.

There is no distinction between an obstruction to a water-course and one to a way, and wrongful interference with a right of way constitutes a nuisance. [p. 386, col. 2.]

Lane v. *Capsey*, (1891) 3 Ch. 411; 61 L. J. Ch. 55; 65 L. T. 375; 40 W. R. 87 and *Thorpe* v. *Brumfitt*, (1893) 8 Ch. 650, referred to.

Soojan Bibi v. *Shamed Ali*, 1 C. W. N. 96, referred to.

Obstructions to easements other than water-courses may be treated as continuing nuisances. [p. 386, col. 2.]

Gillon v. *Boddington*, (1824) 1 Car. & P. 541; Ryan & M. 161 and *Whitehouse* v. *Fellowes*, 10 C. B. (N. S.) 765; 30 L. J. C. P. 305; 4 L.T. 177; 9 W. R. 577; 142 E. R. 654, 128 R. R. 919, referred to.

NANU NAIR *v.* KANTAN ASHTA MOORTHI.

Appeal against the decree of the Subordinate Judge, second Court, Sylhet, dated the 11th April 1913, affirming that of the officiating Munsif, second Court, Habigunj, dated the 22nd of July 1912.

Babu *Gopal Chandra Das*, for the Appellant.

Babu *Birendra Chandra Das*, for the Respondents.

JUDGMENT.—This is an appeal by the first defendant in a suit for establishment of a right of way. The plaintiffs came to Court on the allegation that they had used the disputed land as a path from time immemorial peaceably, openly and uninterruptedly; and that this was the only means of access to their land. The Courts below have found that the right of way as alleged by the plaintiffs has been established, and have made a decree accordingly. The only ground urged by the appellant against this decision is that the question of limitation has been erroneously decided, as the Subordinate Judge has held that section 23 of the Indian Limitation Act is applicable to the case and consequently no question of limitation arises. The obstruction is said by the plaintiffs to have been caused in 1908 and the suit was commenced on the 15th July 1911. It has been urged that section 23 has no application to the case and that the Courts below should have investigated whether the obstruction was caused within 12 years prior to the suit, so as to bring the case within Article 144. In our opinion there is no foundation for this contention.

It was pointed out by their Lordships of the Judicial Committee in *Rajrup Koer* v. *Abul Hossein* (1), where the suit was instituted for the removal of obstructions to a water-course used by the plaintiff from time immemorial, that the obstructions which interfered with the flow of water were in the nature of continuing nuisances as to which the cause of action was renewed *de die in diem* so long as the obstructions causing such interference were allowed to continue. In support of this conclusion reference was made by their Lordships to section 24 of the Indian Limitation Act, 1871. The same view was applied subsequently in the cases of *Achul Mahta* v. *Rajun Mahta* (2) and *Punja Kuvarji* v. *Bai Kuvar* (3). But it has been argued on behalf of the appellant that the cases mentioned related to water-courses, and that although an obstruction to a water-course may rightly be described as a continuing nuisance, an obstruction to a way does not fall within that category. We are of opinion that the distinction suggested is not well founded and that wrongful interference with a right of way constitutes a nuisance [*Lane* v. *Capsey* (4), *Thorpe* v. *Brumfitt* (5)]. The principle laid down by the Judicial Committee in *Rajrup Koer* v *Abul Hossein* (1) and applied in the case of *Punja Kuvarji* v. *Bai Kuvar* (3) was applied by Norris, J., to the case of obstruction of a way in *Soojan Bibi* v. *Shamed Ali* (6) and we agree with the view taken by that learned Judge. A reference to the cases of *Gillon* v. *Boddington* (7) and *Whitehouse* v. *Fellowes* (8) will show that obstructions to easements other than water-courses may be treated as continuing nuisances. We hold accordingly that the Subordinate Judge has correctly applied section 23 to the circumstances of this case.

The result is that the decree of the Subordinate Judge is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530.

(2) 6 C. 812.

(3) 6 B. 20.

(4) (1891) 3 Ch. 411; 61 L. J. Ch. 55; 65 L. T. 375; 40 W. R. 87.

(5) (1893) 8 Ch. 650.

(6) 1 C. W. N. 96.

(7) (1824) 1 Car. & P. 541; Ryan & M. 161.

(8) 10 C. B. (N. S.) 765; 30 L. J. C. P. 305; 4 L. T. 177; 9 W. R. 557; 142 E. R. 654; 128 R. R. 919.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1042 OF 1913.

February 9, 1915.

Present:—Mr. Justice Spencer and Mr. Justice Seshagiri Aiyar.

NANU NAIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

KANTAN ASHTA MOORTHI NAMBUDRIPAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 105 (2)—

NANU NAIR *v.* KANTAN ASHTA MOORTHI.

Res judicata—*Estoppel—Test—Burden of proof—Demise questioned—Original ownership and derivative tenure admitted—Nature of proof required—Evidence Act (I of* 1872), *s.* 90, *presumption in, whether applicable to copies—Arrears of rent, stale claim for—Interest, rate of, allowable—Interest, when allowable on arrears of rent —Enhanced Government revenue, whether payable by mortgagor or mortgagee.*

Section 105, clause (2), Civil Procedure Code, only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order. The test is not whether a decision has been given upon the points raised in the appeal against the order, but whether the party has availed himself of the appropriate remedy of appealing against the order. [p. 389, col. 1.]

Where the question is as to whether certain property had been demised on *kanom* to the defendants' predecessors-in-title, and the property is conceded to have belonged originally to certain persons, others being recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice to shift the burden of proving title to the defendants. [p. 389, col. 2.]

Bala v. *Shiva*, 27 B. 271; 5 Bom. L. R. 85, followed.

Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where the title is denied and possession is not shown to have been under the owners. [p. 389, col. 2.]

Krishna Pillai v. *Rangasami Pillai*, 18 M. 462; 5 M. L. J. 187, *Vasudevan Nambudri* v. *Krishna Pisharoti*, 13 M. L. J. 274 and *Koru Nair* v. *Kesavan Nambudri*, 17 M. L. J. 122, distingnished.

The presumption contained in section 90, Indian Evidence Act, applies not only to original documents, but also to copies thereof. [p. 390, col. 2.]

Ishri Prasad Singh v. *Lalli Jas Kunvar*, 22 A. 294; A. W. N. (1900) 82, followed.

The rate of interest allowable on a stale claim for arrears of rent is only 6 per cent. [391, col. 1.]

Parasurama Pattar v. *Vanktachallam Pattar*, 21 Ind. Cas. 701; (1914) M. W. N. 198; 25 M. L. J. 561, followed.

In the absence of any specific contract to pay interest, or even a period fixed for payment, and in the absence of any demand for the same, no interest is claimable on arrears of rent. [p. 391, col. 1.]

Ganesh Bakhsh v. *Harihar Bakhsh*, 26 A. 299 (P. C.); 31 I. A. 116; 8 C W. N. 521; 14 M. L. J. 190; 6 Bom. L R. 505; *Kamalammal* v. *Peeru Meera Levvai Rowthen*, 20 M. 481; 7 M. L. J. 263 and *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya*, 26 C. 955, followed.

It is the mortgagee in possession and not the mortgagor that is liable to pay the enhanced Government revenue. [p. 390, col. 2.]

Panambatta Kalathil Kunchu Menon v. *Kalathinpadikil Narayanan Ezhutessan*, 25 Ind. Cas. 641; 16 M. L. T. 317, followed.

Second appeal against the decree of the Court of the Subordinate Judge of Coimbatore, in revised Appeal Suit No. 649 of 1909, preferred against that of the Court of the District Munsif, Palghat, in Original Suit No. 322 of 1907.

FACTS of the case appear sufficiently from the judgment.

Mr. *Nilakanta Aiyar*, for the Respondents, raised a preliminary objection that the appellant could not take objection to the finding that the demises were legally proved. He contended that the Subordinate Judge having, in his order of remand, found that the demises were true and that finding not having been reversed by the High Court when the matter came up before it on appeal previously, the question could not now be re-opened.

The preliminary objection was overruled.

Mr. *Anantakrishna Aiyar*, for the Appellants:- Exhibit A has not been properly proved and if that evidence is taken away, there is no other evidence to justify the finding. Where the suit is based on a particular mortgage, no relief could be given on the foot of a different mortgage not pleaded by the plaintiff. Vide *Krishna Pillai* v. *Rangasami Pillai* (1), *Vasudevan Nambudri* v. *Krishna Pisharoti* (2), *Koru Nair* v. *Kesavan Nambudri* (3). In the absence of the original *kanom*-deed the lower Court erred in admitting the *maruput* or copy Not only is it not signed but there is absolutely no proof of the execution. The benefit of the presumption in section 90 and illustration (*g*) to section 114 of the Evidence Act does not apply to copies of documents: *Appathura Pattar* v. *Gopala Panikkar* (4). The Subordinate Judge erred in granting interest at 12 per cent. At the most not more than 6 per cent. could be awarded as the claim was a stale one: *Parasurama Pattar* v. *Venkatachalam Pattar* (5). But no interest at all is claimable in this case. There is no contract to pay, nor is there any demand so as to grant it by way of damages. Vide *Ganesh Bakhsh* v. *Harihar Bakhsh* (6), *Kamalammal* v. *Peeru Meera Levvai Rowthen* (7) and *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya* (8).

(1) 18 M. 462; 5 M. L. J. 187.
(2) 13 M. L. J. 274.
(3) 17 M. L. J. 122.
(4) 25 M. 674.
(5) 21 Ind. Cas. 701; (1914) M. W. N. 198; 25 M. L. J. 561.
(6) 26 A. 299; (P. C.); 31 I. A. 116; 8 C. W. N. 521; 14 M. L. J. 190; 6 Bom. L. R. 505.
(7) 20 M. 481; 7 M. L. J. 263.
(8) 26 C. 955.

The decree as to the liability of the mortgagee to pay the enhanced revenue cannot be supported.

Mr. *Nilakanta Aiyar*, for the Respondents:—Exhibit A was not the only evidence on which the Subordinate Judge based his finding. Exhibits C, D and E clearly support the same. The cases cited by the other side have no application. The original ownership having been admitted, as also the record of a derivative holding, very little evidence would shift the burden: *Bala* v. *Shiva* (9). As regards Exhibit A, it is the prevailing custom in Malabar for mortgagors to retain such copies. [See Wigram on Malabar Law and *Parameswaran Nambudripad* v. *Ammunni Nair* (10)]. It is more than 30 years old and comes from proper custody.

The Subordinate Judge was, therefore, right in acting upon it. *Vide* section 90 of the Evidence Act. The decision in 25 Madras regarding non-applicability of section 90, Evidence Act, to copies of documents was not followed in the case reported as *Ponnambalath Parapravan* v. *Karoth Sankaran Nair* (11). The defendants not having produced the original *kanom*-deed, the presumption mentioned in illustration (*g*), section 114, Evidence Act, naturally arises against them. See *Rajah Kishen Dutt Ram Pandey* v. *Narendra Bahadur Singh* (12) and *Ram Prasad* v. *Raghunandan Prosad* (13). The Evidence Act allows a copy being put in evidence when the original is not forthcoming. Section 90 mentions any document, and ought not to be construed so as to restrict its operation to original documents only. *Vide* Wigmore on Evidence, Volume III, section 2143, sub-section (2), and *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (14). Interest was rightly allowed on arrears of rent. *Vide* Appeal No. 187 of 1899. The enhanced revenue is certainly payable by the mortgagee. *Panambatta Kalathil Kunchu Menon* v. *Kalathinpadikil Narayanan Ezhutessan* (15).

(9) 27 B. 271; 5 Bom. L. R. 85.
(10) 9 M. L. J. 300.
(11) 12 Ind. Cas. 453; 21 M. L J. 981.
(12) 3 I. A. 85.
(13) 7 A. 738; A. W. N. (1885) 160.
(14) 22 A. 294; A. W. N. (1900) 82.
(15) 25 Ind Cas. 641; 16 M. L. T. 317.

JUDGMENT.—The plaintiff's case is that the properties in suit belong to his *mana* in *jenmi*, that they were demised by two *kanom*-deeds in the year 1840 to two ladies, who were members of the defendants' *tarwad*, and that the defendants have denied his *jenmi* title. He sues to recover possession and *michavaram* on payment of the *kanom* amount. The defendants pleaded that the properties did not belong to the plaintiff's *mana* and alleged that they were their *tarwad* properties. They also denied the demises sued on.

The District Munsif held that the demises were not proved and dismissed the suit. On appeal, the Subordinate Judge came to the conclusion that "the demises sued upon were true and that the plaint lands were held under them." He reversed the decree of the District Munsif and remanded the suit.

An appeal was preferred to the High Court against this order of remand. The learned Judges who heard it pointed out that as the District Munsif did not dispose of the suit on a preliminary point, the order of remand was wrong. They set aside that order and directed the Sub-Judge to re-hear the appeal after calling for findings on the other issues raised in the case.

Findings were submitted and on their receipt, the Subordinate Judge held that the properties belonged in *jenmi* to the plaintiff's *mana* and decreed possesion. He also passed a decree for the payment of the *poruppu* and for the value of improvements. This second appeal is against that decree.

Mr. Anantakrishna Aiyar stated frankly at the outset that he was not prepared to contest the finding that the properties originally belonged to the plaintiff's *mana*. He contended that there is no legal evidence to support the demises sued on.

Before dealing with the points argued by the learned Vakil, it is necessary to dispose of a preliminary objection raised by Mr. Nilakanta Aiyar on behalf of the respondents, that it is not competent to the appellant to object to the finding that the demises were legally proved. His contention is that as the Subordinate Judge in his order of remand found distinctly in favour of the demises, and as that finding was not reversed by the High Court in the appeal against his order, the question should not be

re-opened. This argument proceeds on a misconception of the provisions of section 105; clause (2) prevents a party from agitating in the appeal against the decree a question which he could have objected to in the appeal against the order. The test is, not whether a decision has been given upon the points raised in the civil miscellaneous appeal, but whether the party availed himself of the appropriate remedy of appealing against the order. In the present case there was an appeal against the order of remand and that order was reversed. It is difficult to see how the appellant could have compelled the Court to express an opinion on a subsidiary point, when the order itself was vacated. The right view is to hold that the decision on the question of the demises was not given in the order which has been set aside, but in the final judgment which superseded it. The preliminary objection must be overruled.

The main point for consideration is, whether there is legal evidence on which the Sub-Judge could have based his decision in favour of the demises sued on. Mr. Anantakrishna Aiyar contended that Exhibit A has not been properly proved and that there is no other evidence, oral or documentary, which would justify the finding of the lower Appellate Court. Before dealing with Exhibit A, it is desirable to consider whether there is other evidence on which the conclusion of the Sub-Judge can be upheld. Exhibit E is an account of the property given as security by one Sankaran Nair, who admittedly was a member of the defendants' *tarwad*. In the bond he executed "property sowing 80 *paras* of paddy and situated in Netumballam" is described as the *jenmi* of the Kuruvayur *Mana*. Sankaran Nair is described as the *kanomdar*. It is not alleged that the plaintiff's *mana* had any other property in Nettumballam. The amount of the *kanom* is also given. The note appended to the document shows that the *kanom* document was produced before the head *gumastah* of the *Taluq* Office. Then we have Exhibits C and D which are extracts from the Stamp Register Book, showing that two stamp papers for writing *kanom*-deeds relating to lands sowing 40 *paras* of paddy each were purchased in *Meenam* 1015 (corresponding to 1840). They were sold to Kuruvayur Manakkal Nambudripad, the predecessor-in-title to the plaintiff. The District Munsif who decided the point against the plaintiff did not impugn the genuineness of these documents. The description in these documents of the ladies to whom the demises were executed as belonging to Thottanchath led him to hold that the defendants' *tarwad* was not the demisee. The Subordinate Judge, on a careful examination of the evidence, has come to the conclusion that the *tarwad* was known by the names of Kuruvakkat and Thottanchath indiscriminately. In this view, he is justified in holding that the reference in Exhibits C, D and E was to the defendants' *tarwad*. There is also Exhibit C, the evidence of one of the plaintiff's witnesses taken on commission, to support the plaintiff's case. We cannot say that the Subordinate Judge was not entitled to draw the inference that the property belonged in *jenm* to the plaintiff's *mana* and that the defendants' *tarwad* held them as *kanomdars*. Where the property is conceded to have belonged originally to certain persons and others have been recorded as holding under them, very little evidence regarding the actual letting relied upon will suffice. The decision of the Bombay High Court in *Bala* v. *Shiva* (9) applies to such classes of cases. The burden of proof is shifted to the defendants to establish their title. Mr. Anantakrishna Aiyar relies upon *Krishna Pillai* v. *Rangasami Pillai* (1), *Vasudevan Nambudri* v. *Krishna Pisharoti* (2) and *Koru Nair* v. *Kesavan Nambudri* (3) to show that where a particular mortagage is sued upon, Courts should not give relief on a mortgage not pleaded in the case. These decisions do not affect the present case. Where the title of the plaintiff is admitted and the defendants are shown to have come into possession as mortgagees under the plaintiff, Courts will not demand such strict proof of the mortgage sued on as where title is denied and possession is not shown to have been under the owners. The facts appearing in evidence in this case are enough in the circumstances already mentioned to prove the demises sued on.

There is another ground upon which the decision of the Subordinate Judge can be supported. The *kanom*-deeds relied upon have not been produced. If the plaintiff's claim is

true, the deeds must be in the possession of the defendants. They deny the *kanom*. The plaintiff produces Exhibit A which, he alleges, is a *maruput* or copy of one of the *kanom* documents. It is not signed; nor has there been any proof of its execution. It purports to be more than 30 years old. The Subordinate Judge held it to be genuine. He says that it is customary in Malabar for *jenmies* "to keep *maruputs* or copies of *kanom* documents." Mr. Wigram in his book on Malabar Law refers to this practice. In *Parameswaran Nambudripad* v. *Ammunni Nair* (10), *marupattam* is said to be "a copy of the document executed to another to be retained by the party executing it". Exhibit A corresponds to this description. It comes from proper custody. It is argued that the presumption as to ancient documents contained in section 90 of the Evidence Act does not apply to copies. In *Appathura Pattar* v. *Gopala Panikkar*(4), it was stated that the presumption suggested in section 90 and in section 114, illustration (*g*), does not apply to copies of documents. But in *Ponnambalath Parapravan Karoth* v. *Sankaran Nair* (11), the learned Judges were not prepared to follow the earlier ruling. It seems to us that it would be unduly narrowing the scope of section 90 to hold that copies of the documents are not within the rule. In the language of illustration (*g*) to section 114, a presumption arises against the defendants by the non-production of the original. See *Rajah Kishen Dutt Ram Pandey* v. *Narendra Bahadur Singh* (12) and *Ram Prasad* v. *Raghunandan Prasad* (13). Under the Evidence Act, where the original is not produced, a copy made from the original can be exhibited to prove the transaction. Section 90, which follows the sections relating to proof by secondary evidence, refers to presumption regarding "any document." There is nothing in its language to restrict its operation to original documents only. The rule of law is thus stated in Wigmore on Evidence, Volume III, section 2143 (sub-section 2): "Where the alleged ancient *original* is *lost* and an *ancient purporting copy* is offered, made by a private hand, and the purporting maker being unknown or deceased, it seems to have been long accepted that this suffices, and that the copy may be received under the ancient document rule." The authority of Lord Eldon and of Chief Baron Gilbert is quoted in support of this proposition. In *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (14), the principle of section 90 was applied to certified copies. We think that the object of the section will be frustrated, if the presumption is not extended to copies. Of course, Courts must scrutinise such copies very carefully and should not apply the presumption until the conditions required by the section are strictly conformed to. We do not think that when all the tests are satisfied, the fact that the document affected is a copy and not the original should make any difference. We are, therefore, of opinion that the Subordinate Judge was right in acting on Exhibit A. In this view, his finding on the question of title and on the demises sued on must be upheld.

There are a few subsidiary points to be noticed. Exhibit A relates to 40 *paras* sowing land. It fixes the *parappad* payable to the landlord at 5 *paras*. It was argued that as there is no evidence in regard to the *parappad* on the other half of the suit properties, plaintiff is not entitled to any *parappad* in respect of it. In the view that we have taken, that Exhibit A is a copy of one of the two documents of the same date, there is no reason for not holding that the same terms were embodied in the other *kanom* as well. We see no reason for differing from the Subordinate Judge in this respect. We also agree with him that the defendants are entitled to get only the money value of the gold coins as on the date of payment. Exhibit E1 refers to the commutation value in rupees, and that indicates that parties never contemplated the return of the coins or the payment of their value at the time of the redemption. The Sub-Judge is also right in holding that the defendants are only entitled to get a sum of money which would secure to them in perpetuity 20 *paras* of paddy. The contention that the amount must be such as would enable the defendants to purchase a *jenm* right is extravagant. The Sub-Judge has rightly held that the defendants were bound to pay the enhanced Government revenue. After some conflict of views, it was decided in *Panambatta Kalathil Kunchu Menon* v. *Kalathinpadihil Narayanan Ezhutessan* (15) that the mortgagee in possession was chargeable with such pay-

ments. We think that this decision is right. The Subordinate Judge has decreed interest at the rate of 12 per cent. upon the arrears of rent due to the plaintiff. The claim is a stale one and we do not think he was justified in decreeing more than 6 per cent. See *Parasurama Pattar* v. *Venkatachalam Patter* (5). But we think that no interest is payable in this case. The Judicial Committee of the Privy Council pointed out in *Ganesh Bakhsh* v. *Harihar Bakhsh* (6), that where the conditions of Act XXXII of 1839 are not to be found, interest by way of damages is not awardable under the Contract Act. It is on this principle, it was held in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (7), that where there has been an oral lease, no interest is payable on the arrears claimed. Our attention was drawn to an unreported judgment of this Court in Appeal No. 187 of 1899, which seems to suggest that if the contract is in writing, interest may be decreed. We are unable to follow this decision. Their Lordships of the Judicial Committee lay stress upon the clause in the Act which says that the claim must be made 'by virtue of some written instrument at a certain time." Sir Francis Maclean and Banerjee, J., construe this clause to mean that the date of payment must be definite. See *Surja Narain Mukhopadhya* v. *Pratap Narain Mukhopadhya* (8). Exhibit A contains no stipulation for payment of the rent at any fixed time. It only provides that the various payments "should be given per year." There is no evidence in this case that such payments were made or claimed at any particular period of the year The object of the Act is to penalise the person who withholds payment when the same is due. That is the reason why provision is made for interest running after demand. In the present case, there is no period fixed for payment. There has been no demand; and there is no stipulation for interest in the copy produced. Under these circumstances, we must disallow the interest decreed by the Subordinate Judge. Subject to this modification, the second appeal is dismissed. Parties will give and receive proportionate costs throughout. Six months' time from this date for payment.

Appeal dismissed; Decree modified.

COURT OF THE BOARD OF REVENUE UNITED PROVINCES.

REVENUE PETITION No. 8 OF 1908-09 OF FATEHPUR DISTRICT.

March 31, 1909.

Present:—Mr. Baillie, J. M.

M. MURLI DHAR—APPLLICANT

versus

MOHAMED MUNIR—RESPONDENT.

Agra Tenancy Act (*II of* 1901), *s.* 12—Kabuliyat *for one year, function of.*

A *kabuliyat* for one year is intended to regulate rent, not length of occupation and it is not a lease for a fixed period, which cannot count for acquisition of occupancy rights.

Application for revision from an order of the Commissioner, Allahabad Division, dated the 12th November 1908, confirming that of the Assistant Collector of Fatehpur District.

JUDGMENT.—The Commissioner was mistaken in supposing that there was any compromise accepting the holding as an occupancy tenure, but apart from this, his finding was undoubtedly correct. The land is not recorded as *sir* since 1904, the Assistant Collector ordered it to be entered as a holding-in-chief. There is not a vestige of evidence that the land is *sir*. In fact since the time it was purchased by Imam-ud-din and until it was let to respondent, it could not have become *sir*. The land is ordinary *khalsa* and respondent has been cultivating it for upwards of twelve years. I do not consider that there is anything in the compromise of 1904, which estops him from now supporting his right of occupancy.

It is accepted law that a *kabuliyat* for one year is intended to regulate rent, not length of occupation and that it is not a lease for a fixed period, which cannot count for acquisition of occupancy rights. Respondent has clearly not occupancy rights.

The appeal is dismissed with costs on appellant

Application rejected.

MUTHUSWAMY PILLAY *v.* MUTHUVEERAM PILLAY.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 324 OF 1914.

March 1, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

MUTHUSWAMY PILLAY AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

MUTHUVEERAM PILLAY—DEFENDANT—RESPONDENT.

Vendor and purchaser—Court-auction purchaser—Mortgage, existence of, undisclosed—Liability to pay, if non-existent—Purchaser from such purchaser compelled to pay mortgage amount—Liability of auction-purchaser to indemnify private purchaser.

Where a person purchases certain immoveable property at a Court sale in execution of a money decree, in ignorance of the existence of a mortgage upon the same, and subsequently sells it privately to a third party who also purchases without the knowledge of the existence of the mortgage, and where the mortgage is afterwards disclosed and the private purchaser is compelled to pay the amount thereof, the latter is not entitled to claim compensation from his vendor, as the purchaser of property in a Court sale takes it not only with all benefits but also subject to all liabilities. [p. 392, col. 2.]

Izzat-un-nisa Begam v. *Kunwar Pertab Singh*. 3 Ind. Cas. 793; 10 C. L. J. 313; 13 C. W. N 1143; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 31 A. 583; 36 I. A. 203, followed.

Alfatun v. *Rao Karan Singh*, 7 N. W. P. H. C. R. 362, not followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of the Court of the Subordinate Judge of Trichinopoly, in Small Cause Suit No. 546 of 1913.

FACTS.—The plaintiffs purchased privately from the defendant certain immoveable property which he had himself purchased in a Court auction in execution of a money-decree. There was an outstanding mortgage on the property which both the plaintiffs and the defendant were not aware of, as the same had not been mentioned in the proclamation of sale. Plaintiffs having been compelled to pay the amount of the mortgage, now sued the defendant for the reimbursement of the sum so paid. The Subordinate Judge of Trichinopoly dismissed the suit. The plaintiffs preferred this civil revision petition.

Mr. *K. V. Krishnaswami Aiyar*, for the Petitioners:—The plaintiffs, being purchasers, are entitled to the relief claimed.

They are not bound by any fraud on the part of defendant's vendor, vide *Alfatun* v. *Rao Karan Singh* (1).

Mr. *K. Bhashyam*, for the Respondent:—The plaintiffs are not entitled to any relief. It has been held in *Izzat-un-nisa Begam* v. *Kunwar Pertab Singh* (2), that even if property is sold subject to encumbrances and the sale price which the auction-purchaser has to pay is diminished by the amount of that encumbrance, the purchaser and not the judgment-debtor mortgagor is entitled to the benefit of that amount, in case it turns out that the mortgage subject to which the property has been sold is bad. This case is the converse of it, but the principle applicable is the same.

JUDGMENT.—Mr. Krishnaswamy Aiyar restricts his clients' claim to relief to the fact that they are purchasers. He concedes that the ground that there was a wilful suppression of the first mortgage when the mortgage to his clients was executed will not give him a cause of action to sue for the present relief. The plaintiff purchased the property from one who bought it at a Court sale in execution of a money decree against the mortgagor. It was not the duty of the mortgagor to mention in the proclamation of sale that a previous mortgage was subsisting. The purchaser took the property subject to all the encumbrances then subsisting. Consequently he was not entitled to claim from the mortgagor the money paid by him to the first mortgagee. In *Izzat-un-nisa Begam* v. *Kunwar Pertab Singh* (2), the Judicial Committee of the Privy Council held that where a property was sold as being subject to previous encumbrances, and it was subsequently found that the encumbrances were unenforceable, the mortgagor was not entitled to claim from the purchaser the amount of the mortgages which the latter was absolved from discharging. The present case is the converse of that decision. The same principle governs both the cases, namely, that the purchaser takes the burden as well as the benefit, without liability to account to, or a right to claim compensation from, the mortgagor. In

(1) 7 N. W. P. H. C. R. 362.

(2) 3 Ind. Cas. 793; 31 A. 583; 10 C. L. J. 313; 13 C. W. N. 1143; 6 A. L. J. 817; 11 Bom. L. R. 1220; 6 M. L. T. 277; 36 I. A. 203.

Alfatun v. *Rao Karan Singh* (1), the principle underlying the applicability of section 69 has not been discussed. We must hold that the Subordinate Judge is right in his view that the plaintiff has no right to claim the benefit of section 69 of the Contract Act against the defendant.

The petition is dismissed with costs.

Petition dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 301 OF 1912.

March 5, 1915.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ANKALA VENKATA REDDY—PETITIONER—APPELLANT

versus

MANCHALA VENKATA REDDY AND OTHERS—COUNTER-PETITIONER AND HIS LEGAL REPRESENTATIVES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 36, 47—Decree—'Matters in controversy', meaning of—Orders dismissing application to sue in forma pauperis *and awarding day costs, whether amount to decrees and are appealable.*

The term 'matters in controversy' in section 2 (2) of the Code of Civil Procedure, 1908 must not be understood as relating solely to the merits of a case. It would cover any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of a suit and to other matters preliminary, which necessitate an adjudication before a suit is enquired into, in fact all questions concerning a *pending suit*. It does not, however, include an order passed on an application preliminary to the institution of the suit itself, such as an application for leave to sue, and proceedings passed in execution in regard to such orders as well as orders granting day costs are not appealable as they do not come within the scope of section 47, Civil Procedure Code, although such orders can be executed under section 36, Civil Procedure Code. [p. 393, col. 2; p. 394, col. 1.]

Narayan Balkrishna Kulkarni v. *Gopal Jiv Ghadi*, 23 Ind. Cas. 889; 38 B. 393; 16 Bom. L. R. 206; *Secretary of State for India* v. *Jillo*, 21 A. 133; A. W. N. (1898) 204 and *Mozaffer Ali* v. *Hedayet Hosain*, 34 C. 584; 5 C. L. J. 641, followed.

Appeal against the order of the District Court of Kurnool, dated the 22nd August 1912, in Execution Petition No. 12 of 1912, in Original Suit No. 12 of 1909.

FACTS.—The appeal arose out of proceedings to execute an order for costs made by the High Court in an appeal against an order granting permission to sue *in forma pauperis* and another order awarding day costs in the same.

Mr. *K. S. Jayarama Iyer*, for Mr. *V. C. Seshachariar*, for the Respondents, raised a preliminary objection that the appeal was incompetent and relied on *Secretary of State for India* v. *Jillo* (1) and *Mozaffer Ali* v. *Hedayet Hosain* (2) He contended that the orders on question were not decrees, inasmuch as they were not passed in any pending suit, but only in proceedings preliminary to the filing of the suit itself.

Mr. *S. Ranganadha Iyer*, for the Appellant, argued *contra* and relied on *Narayan Balkrishna Kulkarni* v. *Gopal Jiv Ghadi* (3).

JUDGMENT.—An application was made in the Court below to execute two orders, one relating to the grant of costs by the High Court in a petition presented against an order granting permission to sue *in forma pauperis*, and the other relating to the grant of day costs to the plaintiff, when the defendant asked for an adjournment of the case. The District Judge dismissed the application. Hence this appeal. A preliminary objection is raised by Mr. Jayarama Iyer that no appeal lies. We think he is right. The orders referred to are not decrees. We are prepared to accept the extended definition suggested in *Narayan Balkrishna Kulkarni* v. *Gopal Jiv Ghadi* (3) regarding the meaning of the term "*matters in controversy*" in the definition section. That expression is not to be understood as referring solely to the merits of a case. Any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of the suit, and to other matters preliminary, which necessitate an adjudication before the suit is enquired into, will be covered by the expression. But there must be a suit pending. Taking first the application to sue *in forma pauperis*, it is only after the grant of the application that the suit begins. As pointed out in *Secretary of State for India* v. *Jillo* (1) the order rejecting an application to sue as a pauper will not be appealable as a decree. The application in such cases is

(1) 21 A. 133; A. W. N. (1898) 204.
(2) 34 C. 584; 5 C. L. J. 641.
(3) 23 Ind. Cas. 889; 38 B. 392; 16 Bom. L. R. 206

analogous to a petition for leave to sue under Act XX of 1863. It has been held in *Mozaffer Ali* v. *Hedayet Hosain* (2) that orders passed on such applications are not decrees. The reasoning applies equally to the order passed in pauper application. We must, therefore, hold that proceedings passed in execution in regard to such orders do not fall under section 47 of the Code of Civil Procedure, although the order itself can be executed under section 36 of the Code of Civil Procedure. This reasoning applies *a fortiori* to the order granting day costs. The preliminary objection is allowed and the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 986 OF 1914.

April 12, 1915.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

JANGA VENKATAREDDY AND OTHERS —DEFENDANTS—APPELLANTS

versus

JAMAL AHMED SAHEB—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Sale of land—Deficiency in extent—Transfer of Property Act (IV of 1882), s. 55 (a) —Covenant for title, meaning of—Compensation for breach of contract—Claim made after execution of conveyance.

A covenant for title is only a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that the seller has power to transfer the same. [p. 394, col. 2.]

Abdullah Khan v. *Abdur Rahman Beg*, 18 A. 322; A. W. N. (1896) 81; *Doyal Krishna Naskar* v. *Amrita Lal Das*, 29 C. 370; *Tavala Nageswara Row* v. *Saripalli Sambasiva Row*, 11 Ind. Cas. 337; (1911) 1 M. W. N. 361, referred to.

A suit to recover compensation for deficiency in the extent of land purchased is not a suit for damages for breach of a convenant for title, but one for part failure of consideration and for compensation for failure to perform the vendor's part of the contract in full. [p. 394, col. 2.]

Where under the contract the part unperformed bears only a small proportion to the whole of its value, a suit for specific performance with a claim for compensation would lie for the unperformed part. [p. 395, col. 1.]

The same rule also holds good even where the mistake as to the extent is discovered after the execution of the conveyance, as the vendee before that date has no right to inspect the land except with the vendor's permission. [p. 395, col. 1.]

Hill v. *Buckley*, 17 Ves. 394; 11 R. R. 109, 34 E. R. 153; *In re Turner and Skelton*, 49 L. J. Ch. 114; 41 L. T. 668; 28 W. R. 312; 13 Ch. D. 130; *Cann* v. *Cann*, 3 Sim. 447; 30 R. R. 184; 57 E. R. 1065, followed.

Jolliffe v. *Baker*, 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678; 11 Q. B. D. 225, dissented from.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam, in Appeal Suit No. 130 of 1913, preferred against that of the Court of the District Munsif of Ellore, in Original Suit No. 846 of 1911.

Mr. *R Narasimham*, for the Appellants.

Mr. *T. Ramachandra Row*, for the Respondent.

JUDGMENT.

NAPIER, J.—This is an appeal from a judgment of the Temporary Subordinate Judge of Masulipatam, allowing a claim for compensation by the purchaser of certain land in respect of a deficiency in extent. The District Munsif disallowed the claim on the authority of the case reported as *Abdullah Khan* v. *Abdur Rahman Beg* (1). The Subordinate Judge, relying on the case reported as *Doyal Krishna Naskar* v. *Amrita Lal Das* (2), where *Abdullah Khan* v. *Abdur Rahman Beg* (1), was dissented from, allowed the claim. The basis on which the claim is made is not stated in the plaint, but it was sought in argument to base it on the implied covenant for title relying on the case reported as *Tavala Nageswara Row* v. *Saripalli Sambasiva Row* (3). In my opinion that case does not apply. A covenant for title, is not a covenant that the land purported to be conveyed is of the extent stated in the sale-deed, but, as shortly defined in section 55 of the Transfer of Property Act, a contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. Further, this suit is well known in English Law and has never been based on a covenant for title. In my opinion the suit is brought for part failure of consideration owing to a mutual mistake. Admittedly where a contract has

(1) 18 A. 322; A. W. N. (1896) 81.
(2) 29 C. 370.
(3) 11 Ind. Cas. 337; (1911) 1 M. W. N. 361.

been made and one of the parties is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole of its value, a suit lies at the instance of the other party under section 14 of the Specific Relief Act, (I of 1877) for direction by the Court for specific performance of so much of the contract as can be performed with compensation in money for the deficiency. If, therefore, the parties had discovered their mistakes as to the area prior to the conveyance, the vendee could have brought a suit asking for compensation; and seeing that the Specific Relief Act is intended to give reliefs of a certain class where an injury has been suffered, it seems necessarily to follow that a legal injury is presumed by this Act to exist, for which the Act provides a remedy at one stage. I am, therefore, clear that there is a cause of action arising out of a legal injury. This is the view taken by the Courts of Equity in England : *vide* the leading case of *Hill* v. *Buckley* (4) and Dart's Law of Vendors and Purchasers, 7th Edition, page 675.

The only question that remains is whether this claim cannot be made after the execution of the conveyance. That point is expressly decided by Jessel, M. R., in *In re Turner and Skelton* (5). The learned Master of the Rolls says as follows: "No book can be produced to show that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so? ..... The purchaser can only investigate the state of the property before completion by permission of the vendor, which permission the vendor is not bound to give. When the mistake is one which a purchaser could not by due diligence discover, why should he be held not to be entitled to compensation?" The learned Master of the Rolls followed an earlier decision, *Cann* v. *Cann*(6), and decided in favour of the vendee. It is true that a different view was taken in *Jolliffe* v. *Baker* (7), but I am prepared to follow the decision of this high authority as I find nothing in any Statute which makes the principle inapplicable.

The appeal will, therefore, be dismissed with costs.

SADASIVA AIYAR, J.—I entirely agree and have nothing to add.

Appeal dismissed.

(4) 17 Ves. 394; 11 R. R. 109; 34 E. R. 153.
(5) 13 Ch. D. 130; 49 L. J. Ch. 114; 41 L. T. 668; 28 W. R. 312.
(6) 3 Sim. 447; 30 R. R. 184; 57 E. R. 1065.
(7) 11 Q. B. D. 255; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59; 47 J. P. 678.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 733 OF 1914.

March 26, 1915.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Chapman.

DILJAN MIHHA BIBI—JUDGMENT-DEBTOR—PETITIONER

versus

HEMANTA KUMAR ROY AND OTHERS—DECREE-HOLDERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 141, scope of—O. XXI, r. 90; O. IX, r. 9, applicability of—Execution, application for—Sale, application for setting aside.

Section 141 of the Civil Procedure Code, 1908, does not apply to applications for execution. [p. 396, col. 2.]

An application for setting aside a sale under section 47 and Order XXI, rule 90, Civil Procedure Code, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party. [p. 396, col. 2.]

Where on the dismissal for default of an application for setting aside an execution sale under section 47 and under Order XXI, rule 90, of the Civil Procedure Code, another application for setting aside that order under Order IX, rule 9, is made:

Held, that Order IX, rule 9, is applicable to cases of this kind. [p. 396, col. 2.]

Asim Mandal v. *Raj Mohan Das*, 11 Ind. Cas. 385; 13 C. L. J. 532; *Hari Charan Ghosh* v. *Manmatha Nath Sen*, 19 Ind. Cas. 683; 18 C. W. N. 343; 41 C. 1; *Subbiah Naicker* v. *Ramanathan Chettiar*, 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251; *Safdar Ali* v. *Kishun Lal*, 7 Ind. Cas. 241; 12 C. L. J. 6; *Thakur Prasad* v. *Fakir Ulla*, 17 A. 106; 22 I. A. 44; 5 M. L. J. 3; 6 Sar. P. C. J. 526, referred to.

In the matter of section 115 of the Code of Civil Procedure and section 15 of the Charter Act and in the matter of Miscellaneous Case No. 293 of 1913 of the Munsif, second Court, Jhenidah.

Babu *Monmothanath Mukerjee*, for the Petitioner.

Babu *Surendra Chandra Sen*, for the Opposite Party.

JUDGMENT.—An application for setting aside an execution sale under section 47

and Order XXI, rule 90, of the Civil Procedure Code was dismissed for default. The judgment-debtor made an application for setting aside that order under Order IX, rule 9. The learned Munsif rejected the application, holding that Order IX had no application to the case. This Rule was granted on the opposite party to show cause why the application should not be entertained either under Order IX or Order XLVII, or why such other order should not be made as to this Court might seem fit and proper. It is admitted by the learned Vakil for the petitioner that Order XLVII is not open to him, as the application was made to the successor of the trying Munsif. He relies upon Order IX or section 151 of the Civil Procedure Code. I do not think he is entitled to rely on section 151. To allow him to do so would be to allow him to apply for a review which is expressly prohibited by the Code. He must stand or fall by Order IX. There is some apparent diversity of opinion as to whether the provisions of Order IX are applicable to matters arising in execution. In the case of *Safdar Ali* v. *Kishun Lal* (1), it was held that an application for re-hearing a matter arising in execution could be entertained under Order IX, rule 9. This is an express authority on the point. This case was distinguished in the case of *Asim Mandal* v. *Raj Mohan Das* (2) and it was held that all the provisions of Order IX were not applicable to execution proceedings. That was a case in which an application for execution was dismissed for default and it was held that a fresh application for execution would nevertheless lie as Order IX, rule 9, was not applicable to an application for execution. The matter came under discussion again in the case of *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) and it was held that Order IX, rule 13, was not applicable to a proceeding under rules 100 and 101 of Order XXI. Both these cases rely on the history of section 647 of the old Code in the course of its transformation into section 141 of the Civil Procedure Code of 1908. Section 647 of Act XIV of 1882 was: "The procedure herein prescribed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction other than suits and appeals." In consequence of some divergence of opinion between different High Courts as to whether the proceedings named in this section included execution proceedings, an explanation was added by Act VI of 1892: "This section does not apply to applications for the execution of decrees which are proceedings in suits". In 1894 the Judicial Committee held that even without the explanation the section did not apply to applications for execution of decrees, *Thakur Prasad* v. *Fakir Ulla* (4). That was a case in which an application for execution had been struck off at the request of the decree-holder without any permission to apply again, and the question was whether sections 373 and 374 barred a fresh application. This objection was overruled by their Lordships. The result of this decision was that the explanation was held to be superfluous. Section 141 of the present Code runs as follows: "The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction." Supposing that the alteration in language is not material and adopting the construction given by the Privy Council to section 647 of the old Code, it will follow that section 141 does not apply to applications for execution.

An application for setting aside a sale under section 47 and Order XXI, rule 90, is not an application for execution. It is a miscellaneous proceeding in the nature of an original proceeding in which the auction-purchaser is the principal interested party. I do not think that a proceeding of this kind is excluded from the purview of section 141. I think, therefore, that Order IX, rule 9, is applicable to cases of this kind and the cases of *Asim Mandal* v. *Raj Mohan Dass* (2), *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) have not decided to the contrary. Both these rulings are careful in stating that all the provisions of Order IX are not applicable. Some of the provisions, therefore, may apply and the judgment of the learned Chief

(1) 7 Ind. Cas. 241; 12 C. L. J. 6.
(2) 11 Ind. Cas. 385; 13 C. L. J. 532.
(3) 19 Ind. Cas. 683; 18 C. W. N. 343; 41 C. 1.

(4) 17 A. 106; 22 I. A. 44; 5 M. L. J. 3; 6 Sar. P. C J. 526.

Justice in *Hari Charan Ghosh* v. *Manmatha Nath Sen* (3) contains a clear indication that the interests of justice must have an important bearing in the matter: "It is not as though there was any necessity in the interests of justice that the provisions of rule 13, Order IX, should be applicable to proceedings in execution, because the order is not conclusive but is subject to the right of the person aggrieved to bring a suit." In the present case the order is conclusive: there is no regular suit and a review is impossible. The petitioner is, therefore, without any remedy other than Order IX, rule 9, to have an adjudication of her case. I may state that the Madras High Court favours the view contended for by the petitioner in this connection. See *Subbiah Naicker* v. *Ramanathan Chettiar* (5). I would, therefore, make the Rule absolute with costs three gold *mohurs* and direct that the petition of the applicant should be dealt with in due course of law.

Rule made absolute.

(5) 22 Ind. Cas. 899; 37 M. 462; 26 M. L. J. 189; (1914) M. W. N. 205; 1 L. W. 251.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2506 OF 1913.

April 1, 1915.

Present:—Mr. Justice Ayling and Mr. Justice Seshagiri Aiyar.

SATHYABHAMA—PLAINTIFF—APPELLANT

versus

KESAVACHARYA—DEFENDANT—RESPONDENT.

Hindu Law—Maintenance to widow provided for by agreement in writing—Subsequent unchastity—Rights, if forfeited—Starvation allowance, when allowed.

The rule that by subsequent unchastity a Hindu widow forfeits her right to maintenance, applies even where that right is secured to her by an agreement in writing. [p. 397, col. 2.]

Nagamma v. *Virabhadra*, 17 M. 392; *Bhup Singh* v. *Lachman Kunwar*, 26 A. 321; A. W. N. (1904) 13, distinguished.

An unchaste Hindu widow, if she repents of her conduct and leads a moral life on the date of suit, is entitled to at least a starvation allowance. [p. 398, col. 2.]

Visalatchi Ammal v. *Annasamy Sastri*, 5 M. H. C. R. 150; *Parami Ramayya* v. *Mahadevi*, 5 Ind. Cas. 960; 12 Bom. L. R. 196; 34 B. 278; *Kandasami Pillai* v. *Murugammal*, 19 M. 6; *Chirukula Nagalakshmamma* v. *Chirukula Visvanatha Sastri*, 16 Ind. Cas. 389; 23 M. L. J. 284, distinguished.

Roma Nath alias *Ramanund Dhur Poddar* v. *Rajonimoni Dasi*, 17 C. 674 at p. 678, followed.

Second appeal against the decree of the District Court of South Canara, in Appeal Suit No. 46 of 1913, preferred against that of the Court of the District Munsif of Puttur, in Original Suit No. 334 of 1912.

Mr. *H. Balakrishna Rao*, for the Appellant.

Mr. *B. Sitarama Rao*, for the Respondent.

JUDGMENT.—This is a suit by a widow against her deceased husband's brother for maintenance. There was an agreement on on the 30th April 1906 by which the amount was fixed. The plea of the defendant is that since the date of the agreement, the plaintiff had been leading an immoral life and that consequently she is not entitled to claim maintenance. The Courts below have found that she did lead an immoral life, but that, at the time of the suit, she had reformed her ways and was living with her people. Mr. B. Sitarama Rao wanted to argue that she had gone wrong with a *Sudra*, that that entails upon her degradation from caste and that consequently she is not entitled to any maintenance. But there is no finding that the pregnancy which is found, was caused by cohabitation with the *Sudra*. We cannot allow that question to be argued in second appeal.

On the facts found by the Courts below the question for consideration is, whether the plaintiff is not entitled to what is called "starving allowance" from the defendant. It was argued in appeal that the fact that the maintenance was secured by a deed differentiated this case from *Nagamma* v. *Virabhadra* (1). We cannot accept this contention. The instrument is only evidence of the amount which is payable as maintenance. The basis of the claim against the defendant being the duty to maintain, the fact that it is secured by a deed in writing is not a reason for holding that subsequent unchastity would not work a forfeiture. The decision in *Bhup Singh* v. *Lachman Kunwar* (2) related to a compromise which was arrived at regarding the claim of the widow for possession of the property as heiress. It

(1) 17 M. 392.
(2) 26 A. 321; A. W. N. (1904) 13.

was held that the subsequent unchastity of the widow did not deprive her of this property. That decision has no bearing upon the present case. The right to maintenance is dependent upon texts which do not affect succession or inheritance.

There is no direct authority upon the question. The text of Manu in Chapter XI, section 189, applies to all women entitled to maintenance. Under that text if a woman becomes unchaste, she is entitled to a starving allowance. The Prayaschitha Kanda of Yajnavalkya Smrithi, (verses 297 and 298) lays down the rules regarding provisions to be made for women who have misconducted themselves. It has been suggested by the learned Vakil for the respondent that the verses only apply to cases of women who have committed sins other than immorality; but the concluding portion of the commentary of Vijnaneswara on the Smrithi makes it clear that the two verses are intended to cover cases of unchaste women. The commentary is this: "To those women who though have suffered degradation (from caste) and for whom the rites of presenting (disconnecting) water libations, etc., have been performed accommodation, (that is), a small cottage built of straws and leaves should be given in the proximity of the main (building of the) house. Similarly food that is just sufficient for the maintenance of life and also raiment of a low description *along with (the protection) of preventing her from being enjoyed again by another man should be given.*" This last sentence makes it clear beyond doubt that the commentator had in mind the case of fallen women. The text and the commentary, it is conceded, apply to all women alike whether they be wives, widows of co-parceners or mothers. Therefore, according to Manu and Yajnavalkya women who have gone wrong should be given some maintenance. The punishment for their unchastity is that they lose their right to the ordinary rate of maintenance. As against these two texts, the well-known text of Narada has been quoted which says that if a widow of a co-parcener is guilty of immorality, her maintenance should be resumed. This statement is quoted and commented upon by all the Smrithi writers (Mayukha, section 8, placitum 6; Smrithi Chandrika, Chapter XI, section 34, and Viramitrodaya, Chapter III, Part I, section 10). But in none of these texts there is any provision for a woman who had repented and was subsequently leading an honest life. It is not to be presumed from the omission to provide for such a contingency, that the presumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even a starving allowance. This question was raised in *Visalatchi Ammal* v. *Annasamy Sastry* (3) but was left undecided. In *Nagamma* v. *Virabhadra* (1) the learned Judges, following certain Bombay decisions, held that a widow who had misconducted herself was not entitled to maintenance. In the latest Bombay case, *Parami Ramayya* v. *Mahadevi* (4), the earlier cases are not approved. In the Madras case, the question whether subsequent reformation would make any difference was not considered. In *Kandasami Pillai* v. *Murugammal* (5), the learned Judges based the decision on the ground that the fallen woman had tried to foist upon her husband a child who had been born of adulterous intercourse and it was decided that such a woman was not entitled even to a starving allowance. This decision in *Kandasami Pillai* v. *Murugammal* (5) was considered by Miller and Sankaran Nair, JJ., in *Subhayya* v. *Bhavani* (6), and the learned Judges were of opinion that it should be confined to cases where the woman was continuing to lead an immoral life. In *Chirukula Nagalakshmamma* v. *Chirukula Visvanatha Sastri* (7), the wife was not shown to have repented of her misconduct. Mr. B. Sitarama Rao argued that the decision in *Subhayya* v. *Bhavani* (6) should not be extended to widows of co-parceners. As pointed out already, both the text of Manu and that of Yajnavalkya make no distinction between wives and other women, and we see no reason on principle why the widow of a co-parcener should be in a less advantageous position than the wife on the question of being allotted a starving allowance. There are observations in *Roma Nath* alias

(3) 5 M. H. C. R. 150.
(4) 5 Ind. Cas. 960; 34 B. 278; 12 Bom. L. R. 196.
(5) 19 M. 6.
(6) 24 Ind. Cas. 390.
(7) 16 Ind. Cas. 389; 23 M. L. J. 289.

Ramanund Dhur Poddar v. *Rajonimoni Dasi* (8) to the effect that widows who had repented of their misconduct should be given a bare maintenance. The recent decision in *Parami Ramayya* v. *Mahadevi* (4), although it related to the case of a wife contains observations regarding the rights of other women to compassionate allowance. We see no reason for not applying the principle enunciated in that decision to the case before us. We think that the widow is entitled to some maintenance, although she is not entitled to the rate provided for in the deed. The Courts below have found that Rs. 24 a year may be awarded to her in this behalf. We accept that finding. We reverse the decrees of the Courts below and decree maintenance at Rs. 24 a year, from January 1911 till the date of suit. Each party will bear his or her own costs throughout.

Appeal allowed; *Decree reversed.*

(8) 17 C. 674 at p. 678.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 3 OF 1908-1909 OF BIJNOR DISTRICT.

November 10, 1909.

Present:—Mr. Porter, S. M., and Mr. Baillie, J. M.

Musammat SOHANIA—DEFENDANT—APPELLANT

versus

JAGJIT SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (*II of* 1901), *s.* 22—Jat *widow succeeding to her husband's holding—Re-marriage when new Rent Act in force—Life-interest in holding, effect on—Hindu Widows' Re-marriage Act* (*XV of* 1856), *s.* 2, *applicability of.*

The Hindu Widows' Re-marriage Act, XV of 1856, applies to the widows of those castes only among whom re-marriage was illegal before the passing of the above Act, and the widows of those castes in which re-marriage was prevalent at the time of the passing of the Act do not lose their interest in the property of their former husbands.

Therefore, a *Jat* widow who succeded to the holding of her husband while the Rent Act of 1881 was in force, does not lose by remarriage her life-interest in the holding.

Second appeal from an order of the Commissioner, Rohilkhand Division, dated the 22nd July 1909, reversing that of the Assistant Collector, Bijnor District, in a case of ejectment.

JUDGMENT.

PORTER, S. M.—The circumstances of this case are somewhat peculiar. The land in suit was the occupancy holding of one Mokha, who died in 1300 *Fasli*. He left a widow, the present appellant, who under the then Rent Act became entitled to a life-interest in the holding, but for some reason or another the name of the deceased's mother was entered and only after her death that of the present appellant. Appellant has since married again, and the respondent seeks to eject her on the ground that by re-marriage she has lost her life-interest.

The Commissioner has upheld this contention relying on section 2, Act XV of 1856. There are, however, several decisions by the Allahabad High Court to the effect that that section does not apply to the castes in which the re-marriage of widows was lawful before Act XV of 1856 was passed. There can be no question that among *jats* the custom of re-marriage of widows is of old standing. In these circumstances, I think this Court should accept the law as laid down by the Allahabad High Court and hold that appellant has not lost by re-marriage her life-interest in the holding.

On this ground I would set aside the Commissioner's decree and restore the decree of the Assistant Collector. Parties may be left to bear their costs in both Appellate Courts.

BAILLIE, J. M.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 3137 OF 1913.

March 22, 1915.

Present:—Mr. Justice Fletcher and Mr. Justice Teunon.

MOHENDRA NATH MANDAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NARENDRA KRISHNA CHATTERJEE—PLAINTIFF—RESPONDENT.

Bengal Drainage Act (*VI of* 1880), *ss.* 26 (1), 42, 44,

MOHENDRA NATH *v.* NARENDRA KRISHNA.

—Drainage charge—Instalments, recovery of—Mistake —Limitation.

Section 44 of the Bengal Drainage Act is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalments under the two sections 42 and 44. [p. 400, col. 1.]

A mistake about the year of the instalment cannot save limitation. [p. 400, col. 2.]

Appeal against the decree of the Additional District Judge, Hughly, dated the 8th of July 1913, affirming that of the Munsif, first Court, Howrah, dated the 10th of June 1912.

Babu *Nandalal Sarkar*, for the Appellants.

Babus *Surendra Chandra Sen* and *Hari Charan Mukherjee*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Additional District Judge of Hughly, dated the 8th July 1913, affirming the decision of the Munsif. The suit was brought by the plaintiff to recover certain instalments in respect of the drainage charge. The facts which are simple appear to be as follows:—The defendants' father sold the property to the plaintiff. He concealed from the plaintiff at the time of sale the fact that the property was subject to the drainage charge. The plaintiff on his purchase granted a tenancy of the property to the defendants' father and he now sues the defendants in respect of the moneys that he has paid as such charge. As regards the claim, if it had been against the estate of the father of the defendants, apparently that would be barred under the provisions of the law of limitation, but the plaintiff claims to recover these instalments under the provisions of the Bengal Drainage Act. The only question that has been raised is as to whether, in order to enable the plaintiff to sue, it is essential that the mode and time of payment ought to be settled by the Collector under the provisions of section 44. The Collector has not been applied to in this case. But it seems to me that that is merely a permissive section and does not control the right of a land-holder or a superior tenant to recover the instalment under the two sections 42 and 44. The limitation on the right of the landlord or the superior tenant is that the tenant shall not be liable to pay more than 1/10th of the total amount in one year. It is not suggested that the amount sued for in the present case is more than 1/10th of the total amount.

The only point that has got any substance in this case is as to the instalment which became due in 1907. The learned District Judge has said: "It is conceded for the defendants that if the Bengal Tenancy Act regulates the question the claim for 1907 is in time." That concession might or might not have been made. But the gentleman who conducted the case in the Court below on behalf of the defendants was not authorised to concede anything that was not in accordance with the law, and, if it is shown that that is an error, we are bound to put it right. The fact is th t the parties have got a difficulty in dealing with the European dates as compared with the dates of the Bengali Calendar. That is not an important thing. But what did really happen is that this instalment fell due on 30th *Chaiyat* 1313 B. S. That was the last day of the Bengali year. That date corresponds with the 13th April 1906. It was urged in the lower Appellate Court that the date was in 1907. That was clearly a mistake The last date on which the suit could be maintained for that instalment would be 1st *Bysakh* 1317 B. S. The Judge considered it to be 1318 If that is so, that instalment which was called the 1907 instalment but which was really the 1906 instalment, was barred by limitation.

Another question th t has been raised in this appeal is as to interest. Interest was claimed in the plaint in a lump sum. It is not shown on what principle that sum was arrived at or what was the rate charged. Section 26 (1) of the Bengal Drainage Act provides that interest shall have to be paid at the rate of 4 per cent. No question was raised as regards this in either of the Courts below, and we must take it that the parties were content that the interest charged for had been properly arrived at, if payable. The question is not purely a question of law but a mixed question of law and fact, on which no finding has been made by the lower Appellate Court to enable us to consider whether the question has been purely considered or not. The result is that subject to the variation that I have stated, namely, as to the instalment that is called the 1907 instalment but which is really the 1906 instalment being barred by

limitation, the present appeal standsdismissed. In the circumstances, as both parties have partly succeeded in the appeal, I think there should be no order as to costs of this Court.

TEUNON, J.—I agree.

Appeal partly allowed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 173 OF 1914-1915 OF PARTABGARH DISTRICT.

March 30, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

MATA PRASAD—APPELLANT

versus

Babuain SHEO RAJ KUAR—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 5—Occupancy rights—Mortgage, if loss of proprietary rights—Foreclosure, effect of—Loss of proprietary rights after annexation—Accrual of occupancy rights.

Under section 5 of the Oudh Rent Act, occupancy rights arise only when there has been a complete loss of proprietary rights and do not arise when the proprietor retains part of his proprietary rights, as in the case of a mortgage. In the case of a mortgage, complete loss of proprietary rights occurs only when a decree for foreclosure is obtained. [p. 401, col. 2.]

Occupancy rights arise under section 5 of the Oudh Rent Act, XXII of 1886, not only in favour of those proprietors who have lost their proprietary rights before the date of annexation of Oudh (13th day of February 1856), but also in favour of those who have so lost their rights between that date and 24th day of August 1866. [p. 402, col. 1.]

Akbari Begam v. *Badri Prasad*, 5 O. C. 176 at p. 179 and *Suraj Bakhsh* v. *Bhagwandin*, Selected Decision No. 7 of 1903, explained and discussed.

Second appeal from an order of the Additional Commissioner, Fyzabad Division, dated the 8th October 1914, reversing that of the Assistant Collector, Partabgarh District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*March 30th*, 1915).—The mortgage of the proprietary rights of the appellant's ancestors took place in 1855, and there was a foreclosure some three years later, that is to say, after the year of annexation. It has been held by the Board in *Suraj Bakhsh* v. *Bhagwandin* (1) that a temporary mortgage would not give rise to an occupancy right under section 5 of the Rent Act, and in this opinion I concur. The wording of the section is "tenants who have lost all proprietary right", and in my view this does not apply to persons who retain part of their proprietary right. The respondent argues that section 5 is confined to loss of proprietary right by an act of law. His only argument in support of this contention is that section 7A is more specific, and I cannot accept it.

The facts of the present case are somewhat peculiar. The loss of proprietary right took place about a year after annexation, but some eight years before the 24th of August 1866 and some 10 years before Act XIX of 1868 by which rights of occupancy were created. *Suraj Bakhsh* v. *Bhagwandin* (1) lays down:—"The history of the section, which was enacted after discussion with the *taluqdars* of Oudh as a compromise in order to secure some concession in favour of village proprietors who had lost proprietary rights by the inclusion of their villages in *taluqas* and were not entitled to under-proprietary rights under Act XXVI of 1868, shows that it was intended to apply to those persons and those only who had lost their proprietary rights before annexation." The appellant's Pleader argues that this view goes further than the appeal before the Board warranted, and that at any rate, the section covers losses of proprietary rights between annexation and August 24 1866. In *Akbari Begam* v. *Badri Prasad* (2), which was followed in *Bhoga Singh* v. *Pokhar Singh* (3), Mr. Chamier wrote:—"Apart from its history the section itself is quite plain. On the face of it, it applies only to tenants who or whose predecessors had been in possession as proprietors at some time within thirty years next before February 13th, 1856, but who had lost their proprietary rights and had become mere tenants by August 24th, 1866".

One thing is clear, that section 5 was not intended to have prospective effect and extend to losses of proprietary right which took place after Act XIX of 1868 and probably not to losses which took place after August 24th, 1866. The Board in *Suraj Bakhsh* v. *Bhagwandin* (1) did not discuss a case of the nature now before me

(1) Selected Decision No. 7 of 1903.

(2) 5 O. C. 176 at p. 179.

(3) 8 O. C. 353.

and the appellant argues that the Board have in consequence laid down a wider proposition than is justified.

The Board in *Suraj Bakhsh* v. *Bhagwandin* (1) do not appear to have had their attention drected to the opinion of Mr. Chamier, Additional Judicial Commissioner, in *Akbari Begam* v. *Badri Prasad* (2) decided in 1902, though they discussed an older decision of the Judicial Commissioner of 1885. Had their attention been so directed, possibly the Board would have modified the passage in their decision quoted above. Chapter IV of the Introduction of Syke's Compendium of Oudh Taluqdari Law gives a brief history of the recognition of tenants' rights of occupancy in Oudh, and I feel considerable doubt if the history affords any justification for refusing occupancy rights when the former proprietors lost their proprietary rights after annexation but prior to 24th August 1866, though it undoubtedly does when they lost their proprietary rights after that date. The arguments in *Suraj Bakhsh* v. *Bhagwandin* (1) are chiefly directed to the latter case. To refuse occupancy rights in the former case would necessitate reading into section 5 a limitation for which its plain language affords no justification.

I would, therefore, hold that the appellant has a right of occupancy in the land in suit and setting aside the order of the Additional Commissioner restore that of the Assistant Collector, respondent paying costs in all the Courts.

Mr. CAMPBELL, J. M.—I entirely agree.

Appeal allowed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1444 OF 1912.

January 28, 1915.

Present:—Mr. Justice Holmwood and Mr. Justice Walmsley.

NAGESUR PERSHAD SINGH AND OTHERS —PLAINTIFES—APPELLANTS

versus

BINDESHWARI PROSAD SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Decree, sale under—Fraud, allegation of —Execution, who may come in in—Party having no interest in property when decree passed, right of.

Where the plaintiffs had no interest in the property at the time the mortgage-decree was passed and the property was not ancestral:

Held, that they could not come in in execution to set aside the decree. [p. 403, col. 1.]

Debendra Nath Bhattacharjee v. *Prasanna Kumar Chakravarti*, 5 C. L. J. 328, followed.

Appeal against the decree of the District Judge, Shahabad, dated the 1st March 1912, affirming that of the Subordinate Judge, Second Court of that District, dated the 9th of November 1910.

Babus *Provas Chandra Mitra* and *Surendra Madhab Mullick*, for the Appellants.

Babus *Umakali Mukherjee* and *Raghu Nath Singh*, for the Respondents.

JUDGMENT.

HOLMWOOD, J.—These second appeals arise out of suits brought by the plaintiffs to set aside certain mortgage-decrees and sales held in accordance therewith, on the ground that they were tainted with fraud and that they were illegal and the sales were equally so, and that decrees which purported to be against their father did not bind the plaintiffs.

It is conceded that at the time the decrees were passed the plaintiffs were not in existence and, therefore, had no cause of action as regards setting aside the decrees. But the prayers of their plaint show that this is the main ground of their case, the sales being merely subsidiary. The first prayer clumps the decrees and sales together. The second is clearly based on the contention that the decrees being illegal, the sales held under them must also be illegal. On the plaint itself there seem to be many grounds on which the suit is not maintainable. The first we have already stated, that the plaintiffs were not alive at the time the decrees were passed. The second has been stated by the learned Subordinate Judge and not noticed by the Judge in appeal except in general agreement, namely, that on paragraphs 4, 5, 6 and 7 of the plaint it must be held that the reconveyance of the shares of Bhabhutar and Ganput, whom the plaintiffs claim to represent by means of the *hiba-bil-ewaz*, made the properties the self-acquired properties of Bhabhutar and Ganput and if it ever was ancestral property, which does not seem to be asserted, it ceased to be so. Then there is the ground taken in para-

graph 4 of the written statement that the plaintiffs have not specifically mentioned any instance of fraud in their plaint. In dealing with this the learned Judge in the Court below has pointed out that the only allegation in regard to the decree is contained in paragraph 9, and on analysing that in the light of the fact that the plaintiffs were not in existence, he found that that refers to some parties who are not before the Court and it is not known who they are, so that there is substantially no allegation of fraud against the decree which was obtained after contest and which was never contested in execution by the plaintiffs' ancestor. If, therefore, the plaintiffs had no interest in the property at the time the decree was passed and the property was not ancestral property, it is difficult to see how they can seek to come in in execution.

It is argued on the authority of the case to which one of us was a party, the case of *Debendra Nath Bhattacharjee* v. *Prasanna Kumar Chakravarti* (1), that they can bring this suit on the basis of the alleged frauds in execution only, and that whether it be treated as an application under section 47 or as a regular suit is a matter of form and not of substance, as was pointed out in that case. In a passage at the end of the judgment which is *obiter* it was laid down, if there was fraud in the execution proceedings it will be open to the party affected by the fraud to make an application under section 244, Civil Procedure Code; if instead of an application he presents a plaint in the Court competent to deal with the matter, the defect is one of form rather than of substance and there is no real want of jurisdiction, and this is supported by a large number of authorities, and we have no desire to differ from it in any way, as it has nothing to do with the present case which is based essentially upon the prayer to set aside the decree. As the plaintiffs were not interested in the decree they cannot now come in in execution and that alone is sufficient to show that their suit is not maintainable.

The appeals are, therefore, dismissed with costs.

WALMSLEY, J.—I agree that the appeals should be dismissed.

Appeals dismissed.

(1) 5 C. L. J. 328.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1000 OF 1913.

April 17, 1915.

Present:—Mr. Justice Piggott.

PANNA LAL—DEFENDANT—APPELLANT

versus

RAMESHAR SAHAI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 134, 148—Mortgage Mortgagee selling absolute interest in mortgaged property—Redemption—Limitation.

A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties means act of parties to the mortgage transaction. No assertion of adverse title on the part of a mortgagee during the continuance of a mortgage can set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years. [p. 406, col. 1.]

If a mortgagee sells the mortgaged property out-and out to a third person, the possession of the vendee does not become adverse against the owner of the equity of redemption from the date of the sale, and a suit for redemption would lie under Article 148 of the Limitation Act. [p. 405, col. 2.]

Second appeal from a decision of the Additional Subordinate Judge of Moradabad, dated the 21st July 1913.

Dr. *S. C. Banerji*, (with him the Hon'ble Mr. *Gokul Prasad*), for the Appellant.

The Hon'ble Dr. *Sunder Lal* (with him Mr. *Gulzari Lal*), for the Respondent.

JUDGMENT.—I have stated the facts of this case at some length in my remand order of July the 3rd 1914. The finding of the lower Appellate Court on the remanded issue puts it beyond question that the plaintiff is the successor-in-interest of the original mortgagor. The essential facts may, therefore, be recapitulated. On the 24th of January 1867 the predecessor-in-title of the present plaintiff mortgaged by conditional sale a house in the town of Chandausi to one Hazari Lal and put him in possession. On June the 15th, 1873, Hazari Lal sold this shop to Panna Lal, the defendant-appellant. There had been no foreclosure of the mortgage by conditional sale. In the deed of June the 5th, 1873, Hazari Lal recited that the shop in question had come into his possession under a mortgage by conditional sale, but that he was now in possession as a full owner. He did not say that he had foreclosed the mortgage. He undoubtedly purported to sell the shop itself and not any mortgagee rights in respect of the same. The lower Appellate Court has found that the vendee,

Panna Lal, did not in fact believe that his vendor had power to convey an absolute interest in the shop.

I must pause to note that this finding is challenged in argument on behalf of the appellant. It is contended that it was not fairly open to the lower Appellate Court to arrive at this finding. The learned Subordinate Judge held that the very recital in the sale-deed of 1873 was calculated to put the vendee on his guard, that the vendee made no sort or kind of inquiry but went into the transaction with eyes shut. He has, however, gone further than this. Relying partly on the wording of the document and partly on certain facts and circumstances regarding the location of the shop, residence of the parties and so on, and partly on certain oral evidence, he has come to the conculsion that, when the vendee chose to accept his vendor's assertion that he was in full proprietary possession of the shop, he had good reason for believing that this assertion was not true, and did not in fact believe it to be true. Sitting as a Court of second appeal, I am not prepared to hold that the lower Appellate Court had not before it materials on which it was entitled to arrive at the above finding.

If this finding cannot be disturbed, it seems to me that, according to a long course of decisions in this Court, this suit for redemption must succeed and the plea of limitation set up by the defendant-appellant must be overruled. I refer to *Bhagwan Sahai* v. *Bhagwan Din* (1), *Kampta Prasad* v. *Bakar Ali* (2) and *Husaini Khanam* v. *Husain Khan* (3). It has been contended on behalf of the appellant that these decisions are inconsistent with later opinion in this Court itself. On this point reference is made to the case of *Behari Lal* v. *Muhammad Muttaki* (4). I have also been referred to a case decided elsewhere by one of the learned Judges of this Court, namely, *Dal Singh* v. *Gur Prasad* (5), and it has been contended that the same learned Judge has recently re-affirmed the view taken by him in Oudh in an unreported decision in Second Appeal No. 547 of 1914 pronounced by him on March 11, 1915. Further, I have been asked to consider that the current of decisions of this Court with regard to the application of Article 134 of the first Schedule to the Limitation Act (IX of 1908) is inconsistent with the opinions pronounced by other High Courts. There would certainly appear to be a clear consensus of opinion to the contrary in the Bombay High Court, reference being made to *Baiva Khan Daud Khan* v. *Bhiki Sabza* (6), *Yesu Ramji Kalnath* v. *Balkrishna Lakshman* (7), *Pandu* v. *Vithu* (8) and *Ramchandra* v. *Sheikh Mohidin* (9). Other cases to which I have been referred in argument may be found reported as *Ram Kanai Ghosh* v. *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (10) and *Chettokulam Prasanna Venkatachela Reddiar* v. *Collector of Trichinopoly* (11). Finally it was suggested that the latest decision of this Court relied upon on behalf of the plaintiff-respondent, namely, that in *Husaini Khanam* v. *Husain Khan* (3), proceeds upon a view as to the effect of a mortgage by a trustee or a mortgagee amounting to a "purchase" within the meaning of Article 134 of the first Schedule to the Limitation Act, or I should say to a transfer of the property in question within the meaning of the same Article as it appears in Act IX of 1908, and is inconsistent with the pronouncement of their Lordships of the Privy Council in *Abhiram Goswami Mohant* v. *Shyama Charan Nandi* (12).

With regard to a good deal of this argument I think it is sufficient to say at present that, although the Article of the Limitation Act in question refers to transfers both by trustees and by mortgagees, it may well be that by reason of the provisions of the Transfer of Property Act (IV of 1882) different considerations may govern the application of this Article in cases where a transfer has been made by a trustee or by a mortgagee respectively. On this point I desire to add a few words presently. I mention it merely for the sake of noting that

(1) 9 A. 97; A. W. N. (1886) 303.
(2) A. W. N. (1881) 122.
(3) 29 A. 471; A. W. N. (1907) 133; 4 A. L. J. 375.
(4) 20 A. 482; A. W. N. (1898) 123.
(5) 2 Ind. Cas. 250; 12 O. C. 84.
(6) 9 B. 475.
(7) 15 B. 583.
(8) 19 B. 140.
(9) 23 B. 614.
(10) 2 C. L. J. 546.
(11) 24 Ind. Cas. 369; (1914) M. W. N. 587; 26 M. L. J. 537.
(12) 4 Ind. Cas. 449; 6 A. L. J. 857; 14 C. W. N. 1; 11 Bom. L. R. 1234; 19 M. L. J. 530; 10 C. L. J. 284; 36 C. 1003.

the Calcutta and Madras cases to which I have referred above were both cases of transfer by trustees. For the same reason I find nothing in the decision of *Behari Lal* v. *Muhammad Muttaki* (4) to conflict with the course of decisions of this Court governing transfers by mortgagees. All the older cases of this Court relied upon by the present respondent are not even referred to, much less overruled, by the Full Bench which decided *Behari Lal* v. *Muhammad Muttaki* (4). It seems to me, therefore, that I might content myself with saying that I have before me at least three reported cases, each decided by a Bench of this Court, in favour of the respondent's contention that the present suit is not, upon the findings arrived at by the lower Court, barred by limitation. Sitting as a single Judge of this Court I am bound by the decisions above referred to.

I desire, however, as the matter has been fully argued before me, to place on record my opinion that the decision which I propose to pass may be supported independently of the authorities above referred to, by a line of reasoning somewhat different to that which has been followed by other learned Judges of this Court. The suit as brought is against the legal representatives of the original mortgagee and against Panna Lal as transferee of the mortgagee rights. It is on the face of it a suit for redemption of a mortgage and governed by the provisions of Article 148 of the first Schedule to the Indian Limitation Act (IX of 1908). Such a suit is undoubtedly maintainable within the prescribed period of sixty years, against either a mortgagee or any transferee of mortgagee rights. When, therefore, the defendant Panna Lal pleads that the suit as against him is barred by limitation by reason of the provisions of Article 134 of the first Schedule to the Limtiation Act, it seems to me that his pleading requires some further analysis. He must be taken to plead that he is not a transferee of the mortgagee rights, but a person who has somehow come into possession of the property in suit, and that his possession can only be disturbed by means of a suit for ejectment. Now it is quite conceivable that, in a case like the present, the original mortgagor (or his successor-in-interest) might have gone to the original mortgagee (or his successors) and redeemed the mortgage out of Court, receiving in return a full discharge of the mortgage-debt and the mortgagee's claims. If, after having done this, he found himself obstructed by the defendant Panna Lal in his attempt to enter into possession of the mortgaged property, any suit which he might bring against Panna Lal would clearly be a suit for recovery of possession of the kind contemplated by Article 134 already mentioned. Whatever view might be taken as to the meaning of that Article, it could not be denied that the suit was governed by it. In the present case the controversy in reality is whether Article 134 applies at all. The answer to this question must depend on whether Panna Lal is a transferee of the mortgagee rights or is simply a person who has come into possession of the property in suit under a title adverse to that of the original mortgagor.

I venture to suggest that on this view of the case three possible contentions are open: (1) It might be said that the Court will not go beyond the terms of Panna Lal's document of title. He holds what purports to be a sale-deed of the property out and out. Therefore, he cannot be treated as a mere transferee of the mortgagee rights. The suit as against him would, therefore, not be a suit for redemption at all, but a suit for recovery of possession. (2) It might be contended that the Court will not go behind the actual status of the parties to the transaction embodied in the sale-deed of June 5th, 1873; or the legal effect of the said deed. The vendor under that deed purported to convey something which he did not possess, namely, full proprietary rights in respect of the house in suit. He did, however, possess some rights in respect of the house, namely, mortgagee rights. The legal effect of the deed, therefore, would be to convey to the transferee whatever rights Hazari Lal possessed at the time of the transfer. Those rights being rights of a mortgagee, Panna Lal became in law a transferee of the mortgagee rights. A suit for redemption will, therefore, lie as against Panna Lal and the period of limitation for such a suit is sixty years. (3) The case may be looked at from the point of view which has been actually taken in the reported decisions of this Court which I am prepared to follow. If it had been found that Panna Lal entered into

possession of the house in dispute under the sale-deed of June 5th, 1873, in the honest belief that he had obtained full proprietary rights in the said house by reason of that deed, and with the obvious and avowed intention to exercise the rights of a full proprietor, he would, under this view of the case, be entitled, as the learned Judges of this Court said, to the "protection" of Article 134 aforesaid. In effect, as it seems to me, this view of the case involves holding that Panna Lal's possession became adverse against the owner of the equity of redemption from the date of the sale in his favour.

On either of the last two views the suit as brought is within time. I do not desire to discuss the matter further, beyond remarking that, if the learned Judges who have accepted the first of the views set forth above with regard to the operation of Article 134 of the first Schedule to the Indian Limitation Act are right in the interpretation which they have put on the words of that Article, considered by themselves, it seems to me that a conflict of principles becomes involved between the provisions of that Article and those of section 60 of the Transfer of Property Act (IV of 1882). A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties must mean act of the parties to the mortgage transaction. I take it to be settled law that no assertion of adverse title on the part of a mortgagee during the continuance of a mortgage could set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years. The sale by Hazari Lal in favour of Panna Lal was, so far as the vendor was concerned, simply an assertion of adverse title as against the mortgagor. This, I take it, could not operate so as to extinguish his right to redeem, or set time running against the mortgagor. If anything can be held to have set time running against him, it must be Panna Lal's entry into possession under the terms of the sale-deed in his favour. Now assuming for the sake of argument that the present suit had been brought within twelve years of the sale of June the 5th, 1873, it is worth while to consider what sort of suit the mortgagor would have been bound to bring. If he had sued Panna Lal for ejectment as a trespasser he would most undoubtedly have been met by a plea that if Panna Lal took nothing else under this sale-deed he had at least acquired Hazari Lal's rights as a mortgagee, and that the suit against him should be one for redemption and not for ejectment. Yet if the view which seems to have been taken by the Bombay High Court regarding the operation of Article 134 to the first Schedule of the Limitation Act is correct, it would seem to follow that, if the mortgagee in possession chose, even on the very day after entering into possession, to execute a deed purporting to sell the property itself, and not his mortgagee rights therein, to a third party, he could thereby compel the mortgagor to sue for redemption within twelve years of the sale, or to lose his rights by operation of the law of limitation. I find it very difficult to believe that this is either the intention of the Legislature or the effect of the provisions of the law which I have been considering. The result is that I dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 788 OF 1914.

August 10, 1914.

Present:—Mr. Justice Woodroffe and Mr. Justice Coxe.

MADHU SUDAN PAL AND ANOTHER—PETITIONERS

versus

PARBATI SUNDARI DASSYA AND OTHERS—OPPOSITE PARTIES.

Insolvent Debtor's Act (11 *&* 12 *Vict. C.* 21), *s.* 46, *scope of—Leave to appeal—Concurrent jurisdiction of High Court with District Judge – District Judge refusing leave to appeal—High Court, power of, to grant leave to appeal.*

A High Court has concurrent jurisdiction with the District Judge to grant leave to appeal under section 46 of the Insolvency Act and if the District Judge refuses leave to appeal, the High Court is not debarred from granting it. [p 407, col. 1.)

In the matter of an application for leave to file an appeal to the High Court from the orders of the District Judge of Dacca, passed in Insolvency Case No. 125 of 1912 and dated

respectively the 4th May, 10th June and 4th July 1914.

Dr. *Sarat Chandra Bysack* and Babu *Bepin Chandra Bose*, for the Petitioners.

Babu *Prakash Chandra Mazumdar*, for the Opposite Parties.

JUDGMENT.

WOODROFFE, J.—The matter in respect of which an order for leave to appeal is sought, is a question whether the property described in the application should be re-sold. There is no appeal on the question whether the Court was right in refusing to set aside the order passed for default of the 10th June, except so far as the effect of that order was to affirm the order for sale. To make this matter clear, I desire to record the fact that the applicant states that he is prepared to argue this appeal on the materials now on the record without further evidence, oral or documentary.

The order of the 4th May was, in my opinion, an order under the Insolvency Act and though the Judge has refused leave to appeal under section 46, there is a concurrent jurisdiction in us to grant leave to appeal and I would accordingly do so. The appeal is admitted and there is no necessity to make a further application under Order XLI.

The Rule, therefore, is made absolute and the costs will be dealt with upon the hearing of the appeal.

COXE, J.—I agree.

Rule made absolute.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 6 OF 1914-15 OF BALIA DISTRICT.

May 8, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

Maharaja KESHO PRASAD SINGH—PLAINTIFF—APPELLANT

versus

RAMANAND GIR—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 11—Math, whether can acquire occupancy rights—Mahant—Chela—*Succession.*

An association like a *math* cannot be treated as an occupancy tenant under section 11 of the Tenancy Act. [p. 407 col. 2.]

Parmanand Singh v. *Mahant Ramanand Gir*, 21 Ind. Cas. 43; 11 A. L. J. 761; 35 A. 474, not followed.

Selected Decision No. 19 of 1912, followed.

Per *Campbell, J. M.*—A *chela* cannot inherit the occupancy rights of his *guru*. [p. 408, col. 1.]

Second appeal from an order of the Commissioner, Benares Division, dated the 25th June 1914, reversing that of the Assistant Collector of Ballia District, in a case of ejectment.

JUDGMENT.

HOLMS, S. M.—(*April 22nd*, 1915.)—The Collector has found, as a matter of fact, that the occupancy land in suit has been part of the *math* property for a very long time, and the appellant urges that there was no evidence to support this finding. I have looked at the evidence and think there is. It is true that the land has been recorded in the *patwari's* papers as occupancy tenancy of particular *mahants*. The appellant urges that it was acquired originally by *Mahant* Budhram Gir, and that, when he was removed in 1903, the land ceased to be recorded in his name, although one would naturally have expected that the dismissed *mahant* would have clung to his own occupancy tenancy Moreover, the appellant himself in the present plaint describes Sheolochan as occupancy tenant of the land, whereas he could not be occupancy tenant in his own right as he only held it for five years. I consider then that the *mahants* have been managing the land on behalf of the *math*. It is not necessary then to consider the question whether, when a *mahant* dies who has held an occupancy tenure, he is succeeded by his *chela* or not. The real question is that decided in Selected Decision No. 19 of 1912, whether or not an association like a *math* can be treated as a tenant having a right of occupancy in land under section 11 of the Tenancy Act. On the other side, I am referred to the High Court decision in *Parmanand Singh* v. *Mahant Ramanand Gir* (1), who happens to be the defendant in the present case, in which it was held that the manager of a *math* could acquire an occupancy holding on behalf of the *math*. Sir Duncan Baillie, in Selected Decision No. 19 of 1912, has given in considerable detail his reasons for his

(1) 21 Ind. Cas. 43; 11 A. L. J. 761; 35 A. 474.

finding, whereas the learned Chief Justice has dealt with the question somewhat briefly. I am not convinced that Selected Decision No. 19 of 1912 has been wrongly decided I would, therefore, set aside the order of the Collector and restore the order of the Assistant Collector, respondents paying costs throughout.

CAMPBELL, J. M.—I agree with the Senior Member. If we follow Selected Decision 19 of 1912 the *math* cannot be treated as the occupancy tenant of the land, and if it is argued that the manager of the *math* should be considered the occupancy tenant, respondent, has no status, as by Selected Decision 8 of 1904 a *chela* cannot inherit the occupancy rights of his *guru*.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 686 OF 1914.

May 20, 1915.

Present:—Justice Sir George Knox, KT.

RAM HARAKH PATHAK AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM SARAN PATHAK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Jurisdiction, consent of parties whether can give where Court has none—Arbitration—Award—Decree in terms of award—Both parties consenting to appeal being heard against such decree, effect of.

A decree passed in the terms of an award not being appealable, the parties to the decree cannot, by giving consent to an appeal being heard and the case being decided again on the merits, give the Appellate Court jurisdiction to entertain an appeal against such decree. [p. 409, col. 1.]

Second appeal from a decision of the Additional Subordinate Judge, Gorakhpur, dated 27th February 1914.

Mr. *Jang Bahadur Lal*, for the Appellant.

Mr. *Brij Nath Viyas*, for the Respondent.

JUDGMENT.—The plaintiffs, now respondents, sued on a bond. The defendants pleaded payment. The matter in dispute was referred to arbitration; the arbitrator decided in favour of the plaintiffs. Objections were taken by both parties. The lower Court, after considering the objections, dismissed them and drew up a decree in terms of the award. From that decree an appeal was filed to the Court of the Additional Judge. The Additional Judge accepted the appeal and on the 16th of August 1912 entertained an application signed by one of the plaintiffs and the Vakil engaged for both plaintiffs on the one side, and by the defendant Ram Harakh and a Pleader who appeared for both defendants on the other. The application was to the effect that both parties agreed that the appeal should be accepted (*manzur*) and that the case should be decided on the merits. The Additional Judge ordered that the appeal is accepted and the case be decided on the merits. Some evidence was taken and the case remained on in the Court of the Additional Judge until the 4th of April 1913. Then, so far as the record shows, the case went automatically to the Court of the Subordinate Judge of Basti. No doubt there must have been some order, but whether that was an order passed by the District Judge or by the Additional Judge does not appear. There remains the fact that on the 5th of April the case appeared in the Court of the Subordinate Judge of Basti and he began to exercise jurisdiction upon it. It remained in that Court until the 21st of January 1914, when we are told that by an order of the District Judge of Gorakhpur the case was made over to the Court of the Additional Subordinate Judge of Gorakhpur; that officer held that no appeal lay under the circumstances to the Court of the Additional Judge, that the admission or agreement of parties was on a point of law and was to the effect that a certain Court should re-try the case, that this agreement was not binding on the plaintiffs, and that it did not give that Court or the present Court any jurisdiction to hear the appeal. He accordingly dismissed the appeal.

It is obvious that the record is incomplete, that there are papers which ought to be on the record, which are not there now, and the absence of these papers has caused the waste of a whole day of time by this Court. I expect

the learned District Judge to look into the matter and see to whom it is owing that this record has been drawn up in such an incomplete way.

The defendants have come here in appeal and have submitted a memorandum of appeal consisting of seven pleas. The *first* is to the effect that the learned Additional Judge had no jurisdiction to set aside the order of his predecessor dated the 16th of August 1912. I do not know, nor can I ascertain from the record, who the predecessor of the learned Additional Judge was. So far as the record shows Mr. Rose was the only Additional Judge who dealt with this case. The *second* plea is to the effect that the agreement of the parties dated the 16th of August 1912 was binding on both the plaintiffs and the defendants and the plaintiffs have no right to resile from the same. There is no doubt that the procedure adopted by the learned Additional Judge in passing that order of the 16th August 19 2 was very erratic. The order in question was a decree based upon an award. From that decree no appeal lay to the Additional Judge and he had not the least power to adopt the procedure which he afterwards did. The 3*rd* and 4*th* pleas are practically to the same effect. The *fifth* plea is to the effect that the plaintiffs were estopped from questioning the jurisdiction of the Court to hear the appeal on the merits. This follows my decision on the preceding plea. *Then* there is a plea to the effect that even if the appellants' Vakil made any admission on a point of law, it is not binding on the appellants. The *last* plea is that the Additional District Judge being seized of the case, the order of transfer to the Court of the Additional Subordinate Judge was bad in law. I cannot find the order of transfer on the record and it is impossible to say what that order was. In the absence of the order it must be persumed to have been rightly made until the contrary is shown. A great deal of argument was addressed to me and several cases cited as to the power of the District Judge to withdraw an appeal from a Subordinate Court when that Court has gone to some length in the case. I quite agree with the contention that it is most inexpedient for orders of this nature to be passed, but I cannot say that such orders are illegal, specially when I am not satisfied as to the circumstances under which the order was passed.

The result then is that we are carried back to the appeal which was filed in the Court of the Additional District Judge, no appeal lay and everything that followed must be swept aside as without jurisdiction and I come back, though not quite by the same road, to the decree of the 30th of May 1912.

I dismiss this appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION NO. 32 OF 1914-15 OF BULANDHASHR DISTRICT.

April 3, 1915.

Present:—Mr. Holms, S. M., and Mr. Campbell, J. M.

MOHAMMAD YUSUF KHAN—APPELLANT

versus

Musammat NANHI—RESPONDENT.

Agra Tenancy Act (*II of* 1901), *s.* 22—*Succession—Uncle sharing in cultivation with nephew.*

An uncle, if he shared in cultivation with his nephew at the latter's death, can succeed to the latter's holding. [p. 409, col. 2.]

Where a nephew died and was succeeded by his widow, who re-married and thus ceased to have an interest in the husband's holding but remained in possession, and the uncle thereupon claimed the holding:

Held, that the uncle should be recorded as an occupancy tenant. [p. 410, col. 1.]

Per *Campbell, J. M.*—An uncle is no heir to his nephew under section 22 of Act II of 1901. [p. 410, col. 1.]

Third appeal from the order of the Commissioner of the Meerut Division, dated the 27th October 1914, confirming that of the Collector of Bulandshahr District in a case of correction of *jamabandi*.

JUDGMENT.

CAMPBELL, J. M.—(*March* 23*rd*, 1915). —The Collector and Commissioner have found that Khushia shared in the cultivation of his nephew Harsukh during the latter's lifetime, and this finding of fact cannot be disputed in revision.

But this application raises two interesting points of law which require consideration.

The *first* is, "can an uncle succeed to the rights of a nephew under section 22". I

think the answer to this must be in the negative. The sub-section (*e*) says clearly and definitely that a collateral to succeed must be "the nearest male relative in the male line of *descent*" and the whole trend of section 22 is in the same direction. Paragraph (*a*) also refers to a lineal *descendant* in the male line of *descent* and a father is carefully excluded from inheritance.

I think that the section must be read literally and that this excludes Khushia from any right of inheritance.

The *next* point is whether the widow being in sole possession of the occupancy holding of her first husband and the other claimant Khushia being out of possession, any order could be passed, even if Khushia were recognised as entitled to succession, to record him as an occupancy tenant, with the widow as the sub-tenant, or whether the widow could not claim to be recorded as a non-occupancy tenant since her occupancy rights lapsed on re-marriage. In such a case I am of opinion that a collateral could claim to be recorded as the occupancy tenant, as there would be considerable danger of his rights, as a reversioner lapsing if he could not claim them until the widow died or was ejected. For the reasons above given, I would set aside the orders of the Commissioner and Collector and restore the orders of the Assistant Collector, to the effect that Khushia has no title to ask for the removal of the widow's name and the substitution of his own.

I would make him to pay the widow's and the *zemindar's* costs in all Courts.

HOLMS, S. M.—(*April 2nd*, 1915).—I am unable to find any decisions which throw light on the question of whether a man can succeed to the occupancy holding of his brother's son under section 22 (*e*). The words "Nearest collateral male relative in the male line of descent" seem to me to mean the nearest male collateral in the male line of descent from a common ancestor. Line of descent means a line drawn from any person in a genealogical tree downwards and not upwards, so the words in section 22 must refer to the line of descent from a common ancestor. It is true that it is somewhat anomalous that in the case of a self-acquired occupancy tenancy the father could not succeed to it on his son's death, whereas the father's brother could, if he had shared in the cultivation. But an uncle is as much a collateral in the male line of descent as a cousin.

I would dismiss the appeal with costs.

As regards the second point raised by my colleague, I would leave it to the Collector to settle how the widow's name should be recorded, if she still remains in possession after her late husband's uncle has been recorded as occupancy tenant.

CAMPBELL, J. M.—The appeal stands dismissed with costs.

Appeal dismissed.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

REVENUE PETITION No. 7 OF 1907-08
OF FARRUKHABAD DISTRICT.
May 11, 1908.

Present:—Mr. Porter, S. M., and Mr. Darrah, J. M.

BHAWAN—PLAINTIFF—APPELLANT
versus
ZAHUR ALI—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), s. 4 (12)—Grove—Improvement—Land—Plaint once admitted, whether can be rejected subsequently.

The planting of trees in holding is an improvement within the meaning of section 4 (12) of the Agra Tenancy Act. [p. 411, col. 1.]

Therefore, a grove is land within the meaning of the Tenancy Act. [p. 411, col. 1.]

A plaint once admitted cannot be afterwards rejected on the ground of any defect subsequently discovered in it. [p. 411, col. 1.]

Second appeal from an order of the Commissioner, Agra Division, dated the 4th September 1907, reversing that of the Assistant Collector, Farrukhabad District, in a case of assessment of rent.

JUDGMENT.

PORTER, S. M.—(*May 2nd*, 1908.)—This is a second appeal in a suit under sections 150, 156, Agra Tenancy Act, for the assessment of rent on certain rent-free land. In the Court of first instance defendant-respondent claimed proprietary rights in the land, and under section 199 of the Act defendant-respondent was required to institute a civil suit for the determination of the question of title. The Civil Court found that defendant-respondent had no proprietary rights in the land. The Assistant Collector then

proceeded to assess the land to rent, and fixed the amount at Rs. 35 per annum.

On appeal the Commissioner held that as the land in suit had been judicially found in 1904 to be planted with trees, which constituted a grove, and as no change in the character of the land had been shown to have taken place since the date of that finding, the area in suit did not come within the definition of land in section 4 (2) of the Agra Tenancy Act.

The Commissioner, therefore, dismissed the suit.

I do not think the Commissioner's finding can be sustained. It is clear from the record that the land is cultivated. The planting of trees in a holding is an "improvement" as defined in section 4, clause (12), of the Act; and section 88 of the Act lays down the conditions under which trees may be planted by tenants. It would be absolutely inconsistent with these clear provisions of the Act to hold that a holding or part of a holding planted with trees is not "*land*" within the scope of the Act.

Further "rent" is defined in clause (3) of section 4 as "whatever is .....to be paid or delivered by a tenant for land held by him, *or on account of groves*", *etc.* The term 'grove' means a collection of trees standing on land. It seems to me impossible to hold that a land-holder may sue for the rent of a grove under the provisions of the Tenancy Act, but that the land on which the grove stands lies outside the provision of the Act.

The Commissioner also found that the plaint was inadequately stamped, but has not based his decree on this defect. It has been held by the High Court that a plaint once admitted cannot be afterwards rejected on the ground of any defect subsequently discovered in it. Plaintiff-appellant must be required to make good the deficiency, if this has not already been done.

Subject to the making good of the deficiency in the Court-fees, I would set aside the decree of the Commissioner, and restore the decree of the Assistant Collector with costs in this and lower Appellate Courts.

DARRAH, J. M.—I concur. I have recently come to the conclusion in another case that a grove must be considered to be "land" within the meaning of the Tenancy Act. I, therefore, hold the same view as the Senior Member.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION PETITION No. 21 OF 1915.

May 11, 1915.

Present:—Mr. Justice Chamier and Mr. Justice Tudball.

RAM AUTAR TEWARI—DEFENDANT—APPLICANT

versus

DEOKI TEWARI—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code, s. 115, *Sch. II, cl.* 15—*Award, setting aside of—Appeal, maintainability of.*

An order of a Court setting aside an award on the ground of its invalidity on account of misconduct of the arbitrators is appealable. [p. 412, col. 2.]

Ganga Prasad v. *Kura*, 28 A. 408; A. W. N. (1906) 64; 3 A. L. J. 168, *Kalyan Das* v. *Piary Lal*, 4 A. L. J. 256; A. W. N. (1907) 110, not approved of.

Shyama Charan Pramanik v. *Prolhad Durwan*, 8 C. W. N. 390; *Ram Jiwan* v. *Nawal Singh*, 5 A. L. J. 644; A. W. N. (1908) 242; 4 M. L.T. 400; *Damodar Trimbak* v. *Raghunath Hari*, 26 B. 551; 4 Bom. L. R. 267 and *Achuthayya* v. *Thimmayya*, 31 M. 345; 18 M. L. J. 228; 3 M. L. T. 315, referred to.

Civil revision against an order of the Additional District Judge, Gorakhpur, dated the 24th October 1914.

Mr. *Jang Bahadur Lal*, for the Applicant.

Mr. *Ishwar Saran*, for the Opposite Party.

JUDGMENT.—This application for revision arises out of a suit filed in the Court of a Munsif. The parties agreed to refer the matters in difference between them to arbitration and an order of reference was made accordingly. The time for completing the award was extended from time to time up to December 2nd, 1912. On the case being called on on that date, it was found that the award had not been filed. The Munsif then made an order superseding the arbitration and fixed December 10th for the hearing of evidence. On December 5th the arbitrators filed an award purporting to have been made on December 2nd, but the Munsif held that the award had not been made in time and he declined to re-call his order superseding the arbitration. Ultimately he tried the case out and dismissed it. The plaintiff appealed to the District

Judge, and one of his grounds of appeal was that the award had been made in time, and, therefore, the arbitration should not have been superseded The Additional Judge held that the Munsif was wrong in holding that the award had not been made within time merely because it had not been filed in Court within the time limited, and that he should have enquired whether it had been made by the arbitrators within that time. Accordingly he remanded the case under Order XLI, rule 23. The Munsif after inquiry dismissed the suit again, holding that the award had not been made within time, and also that it was invalid on account of misconduct by the arbitrators. The plaintiff appealed and the Additional Judge found that the award had been made within time, and he remitted an issue on the question of misconduct The Munsif found on the issue in favour of the plaintiff. The Additional Judge agreed with the Munsif and passed a decree in accordance with the award which was in favour of the plaintiff. The defendant has applied to this Court for revision of the order of the Additional Judge, on the ground that the Munsif's second order holding that the award was invalid on account of misconduct of the arbitrators could not be interfered with by the Additional Judge. No appeal lies against the order of a Court under paragraph 15 of the 2nd Schedule to the Code of Civil Procedure setting aside an award, and it is contended that the order cannot be challenged in appeal against the decree in the suit, because even if it is erroneous it does not affect the decision of the case within the meaning of section 105 of the Code. The applicant relies upon the decisions of this Court in *Ganga Prasad* v. *Kura* (1) and *Kalyan Das* v. *Piary Lal* (2). In the latter case Aikman, J., merely followed the former which was a decision by two Judges. The learned Judges who decided the former case profess to follow the decision of Banerjee, J., in *Shyama Charan Pramanik* v. *Prolhad Durwan* (3), but an examination of the judgment of Banerjee, J., shows that he was of opinion that an Appellate Court was entitled in an appeal against a decree to interfere with the order of the Court of first instance setting aside an award. He held that a second appeal lay against the decision of the Appellate Court and he sent the case back in order that certain evidence might be taken. The judgment of Banerjee, J., seems to us to give no support whatever to the view taken in *Ganga Prasad* v. *Kura* (1). The decision in the last-mentioned case and the decision in *Kalyan Das* v. *Piary Lal* (2), which follows it, seem to stand quite alone. They are inconsistent with several decisions of this Court beginning with the Full Bench decision in *Nanak Chand* v. *Ram Narain* (4) and ending with the decision of Knox and Griffin, JJ., in *Ram Jiwan* v. *Nawal Singh* (5), with the decision of the Bombay High Court in *Damodar Trimbak* v. *Raghunath Hari* (6) and with a long string of cases in the Madras High Court ending with *Achuthayya* v. *Thimmayya* (7). It seems to us that an order of a Court setting aside the award of an arbitrator and deciding that the case shall be tried by the Court is an order affecting the decision of the case within the meaning of section 105 of the Code. It has been held that the words "affecting the decision of the case" in section 105 mean "affecting the decision of the case on the merits," but even so we think that the order of the Munsif setting aside the award was liable to be challenged in appeal against the decree. As long ago as 1870 Sir R. Couch and Kemp, JJ., held that such an order affected the decision on the merits, see *Mothooranath Tewaree* v. *Brindabun Tewaree*(8). The weight of authority is clearly against the applicant and we are of opinion also that the order of the Munsif was liable to be challenged in appeal against the decree. It is not suggested that there is any other ground upon which we could in revision interfere with the order of the learned Additional Judge. This application is dismissed with costs.

Application dismissed.

(1) 28 A. 408; A. W. N. (1906) 64; 3 A. L. J. 168.
(2) 4 A. L. J. 256; A. W. N. (1907) 110.
(3) 8 C. W. N. 390.
(4) 2 A. 181.
(5) 5 A. L. J. 644; A. W. N. (1908) 242; 4 M. I. T. 400.
(6) 26 B. 551; 4 Bom. L. R. 267.
(7) 31 M. 345; 18 M. L. J. 228; 3 M. L. T. 315.
(8) 14 W. R. 327.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 558 OF 1910.

March 17, 1915.

Present:—Mr. Justice Sharfuddin and Mr Justice Coxe.

UDIT NARAIN CHOWDHURY AND OTHERS—DEFENDANTS—APPELLANTS

versus

MATHURA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 54—Sale by registered instrument or by delivery of possession—Bond, where to be registered—Intention to sell or mortgage, want of—Registration law, fraud on.

Per *Sharfuddin, J.*—Under section 54 of the Transfer of Property Act the sale of immoveable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property. [p. 414, col. 1.]

A Registrar has no jurisdiction to register a bond where the person giving the bond has no property in the district. [p. 414, col. 2.]

Harendra Lal Roy v. *Hari Dasi Debi*, 23 Ind. Cas. 637; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 41 C. 972 (P. C.); 1 L. W. 1050, followed.

Makhan Lal Pal v. *Bunku Behari Ghose*, 19 C. 623 (F. B.), followed.

Appeal against the decree of the District Judge of Darbhanga, dated the 1st of September 1910.

Babu *Sorashi Chandra Mitter*, for the Appellants.

Babus *Chandra Sekhar Banerjee* and *Sib Chandra Palit*, for the Respondents.

JUDGMENT.

SHARFUDDIN, J. This is an appeal against the judgment and decree of the District Judge of Darbhanga, dated the 1st September 1910.

The learned District Judge decreed the suit of the plaintiff and hence the present appeal by the defendants. In order to understand the grounds urged against the judgment of the lower Court, it is necessary to refer to certain facts antecedent to the institution of the present suit.

The suit is to recover a sum of Rs. 10,243-6-0, principal and interest on a registered mortgage bond dated the 27th February 1902 executed by the defendant No. 1, Udit Narain Choudhury, as head and manager of a Hindu joint family of which the other defendants are members.

The plaintiff's mother, *Musammat* Moharani Bibi, inherited the property of her father, Brij Bhukhan Lal. While she was in possession of the property, she sold a share in *Mouza* Mohammadpore Bowari in 1884 to Nena Choudhury, father of Udit Narain. All the time the members of Nena's family were joint, but in 1899 there was a partition and the property in Mohammadpore Bowari fell to the share of Nena, who had originally purchased it as the manager of a joint family including himself and his brother and their issue.

Moharani Bibi died in 1890 and Ram Anugrah Persad, generally known as Polai Lal Mahta, became guardian of the plaintiff who at the time was a minor. In 1901 the plaintiff filed a suit for setting aside the *kobala* executed by his mother, Moharani Bibi, in favour of Nena Choudhury during his minority, on the ground that the sale was made without legal necessity and the property was conveyed for an inadequate price. At that time the plaintiff filed seven other suits of a similar nature to cancel alienations of property made by his mother in favour of other persons.

On the 27th February 1902 a petition of compromise with the permission of the Court was filed in the suit, in which it was stated that Udit Narain was to be allowed to retain the property which his father had bought from Moharani Bibi in consideration of a payment of Rs. 14,000. It was stated in the petition that Rs. 6,000 of this sum had been paid in cash and that Udit Narain on his own behalf and as manager of the joint family, consisting of himself and the other defendants in that case and in this, had executed a mortgage-bond for the balance, *i.e.*, Rs. 8,000. This bond of Rs. 8,000 is dated the 27th February 1902, and is the bond in suit.

Udit Narain alleges that this bond was a sham transaction and it was never intended to be enforced. He gives a most absurd explanation why and with what object he subjected himself to a liability of Rs. 8,000. I do not think it is at all necessary to refer to his story, as the suit should have been decided on another ground.

One of the issues raised is this: "Whether the share of *Mouza* Kolooha Jairampore, *Chakla* Nai, does not belong to the

defendants; if so, whether the bond in suit is invalid and inoperative for being registered in the Mozafferpore registration office."

It appears that in the bond for Rs. 8,000 executed by Udit Narain two properties were mortgaged, namely, Mohammadpore in the Darbhanga District and one *kowri* of Kolooha in the Mozafferpore District. The question is whether this small share of Kolooha belonged to Udit, and if it did not belong to him, whether the registration of the bond in the Mozafferpore District was invalid, and whether if invalid, the bond is enforceable.

On behalf of the plaintiff it is urged that this share in Kolooha was purchased by Udit from one Usman (P. W. No. 1).

This witness says:—"I sold a share of one *kowri* in Kolooha, a *kobala* was executed, but it was not registered. The price was Rs. 30. I do not remember who witnessed the execution. It was executed two or three days before the execution of the bond in suit. I do not remember if Polai was present. I sold the property at the request of Udit Narain, who wanted to register it in Mozafferpore in order to complete the transaction quickly and had no property in the district. He said if there was delay in registration the compromise might fall through."

It is apparent from the above statement that as Udit had no property in the District of Mozafferpore and as he was anxious to see that the bond was quickly registered, he asked Usman to sell to him a small share in Kolooha.

Under section 54 of the Transfer of Property Act the sale of immoveable property of value less than Rs. 100 may be made either by a registered instrument or by delivery of the property.

The value of 1 *kowri* in Kolooha is said to be only Rs. 50 and the sale-deed admittedly was not registered and hence in order to effect a proper and binding sale, possession of the share should have been delivered to Udit. There is admittedly no evidence that any delivery ever took place. The sale, therefore, was not complete when the bond executed by Udit was registered. That being the case, he had no property in the District of Mozafferpore when the bond was presented for registration in the Mozafferpore registration office and hence the Registrar of that office had no jurisdiction to register that bond, and that bond, therefore, did not create any liability against Udit Narain. It was so held by their Lordships of the Judicial Committee in the case of *Harendra Lal Roy* v. *Hari Dasi Debi* (1). The facts of this reported case are these.—A property not belonging to a lady, alleged to be situated within the original jurisdiction of this High Court, was entered in the schedule of the mortgaged properties attached to a mortgage-deed for the purpose of securing registration in the Calcutta registry office. Their Lordships held "that the entry of such a property was a fictitious entry and represented no property that the mortgagor possessed or intended to form part of his security. Such an entry intentionally made use of by the parties for the purpose of obtaining registration in a district where no property actually charged and intended to be charged in fact existed, was a fraud on the Registration Law and no registration obtained by means thereof was valid." It appears that the High Court had passed a decree on the strength of the mortgage and their Lordships held that "the High Court had no jurisdiction to make the decree, and the deed not having been registered in accordance with the Registration Act the mortgagee had no title to maintain the suit."

As to the provisions of section 54 of the Transfer of Property Act, it was held in the case of *Makhan Lal Pal* v. *Bunku Behari Ghose* (2) that the transfer by the sale of tangible immoveable property of value less than Rs. 100 can be effected only by one of the two modes mentioned in section 54, clause 3, of the Transfer of Property Act, *viz.*, by a registered instrument or by delivery of possession.

On the legal aspect of the transaction the appellant is bound to succeed, but we have no doubt that the defence set up by the appellant was a most dishonest defence. His story of the sham transaction in order to oblige Polai is a story which cannot be believed. In the above circum-

(1) 23 Ind. Cas. 637; 41 C. 972 (P. C.); 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774 1 L. W. 1050.

(2) 19 C. 623 (F. B.).